HANBURY'S
Modern Equity

NINTH EDITION

By R. H. Maudsley

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MODERN EQUITY

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NINTH EDITION

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LONDON
STEVENS & SONS LIMITED

First Edition 1935
Second Edition 1937
Third Edition 1943
Fourth Edition 1946
Fifth Edition 1949
Sixth Edition 1952
Seventh Edition 1957
Eighth Edition 1962
Ninth Edition 1969

346.059
H19M

Published by
Stevens & Sons Limited
of 11 New Fetter Lane in
the City of London and
printed in Great Britain by
The Eastern Press Ltd. of
London and Reading

SBN Hardback 420 42780 5
Paperback 420 42770 8

K. UNIVERSITY LIB
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FOREWORD

I WOULD begin by quoting from an early favourite, George Eliot. When asked to preside at the dinner to the tenants on the coming-of-age of Arthur Donnithorne, old Martin Poyser protested that " the ould folks ha' had their turn—they mun make way for the young uns." The truth is that, as it was put to me by a very wise colleague and friend, many years my senior at Lincoln College, Oxford, though an old man may still be capable of doing good work, a younger man will do better work. He was Nevil Sidgwick, one of the most eminent scientists of his day, and nephew of Henry Sidgwick, whose connections with, and generous aid to, the advancement of legal studies can never be forgotten by a grateful posterity. Not only did his works have a profound bearing on jurisprudence from the philosophical angle, but he provided, out of his own resources, the first academic post filled by the mighty Maitland.

The first edition of this book was published in 1935, when I was thirty-seven years old. I dedicated it to my old teacher, Sir William Holdsworth, who so stimulated my interest in equity that I had, early in my teaching career, decided to make its study my chief life-work. The English-speaking world had been, on the whole, poor in works on the subject. The nineteenth century had produced Spence's *Equitable Jurisdiction,* the famous treatise of the great and prolific American jurist, Joseph Story, who had disciples in Pomeroy and Huston, and the first edition of Snell's shorter work, which has now run into twenty-six editions. The early twentieth century marked the publication of Maitland's lectures, collected as a book by his devoted pupils, Chaytor and Whittaker, and Ashburner's learned treatise, which was unfortunately killed stone dead by a review, which might well serve as a model of what a review should not be. We had, in addition, a work by Strahan, and another by Indermaur and Thwaites, which I used myself with profit. On the law of trusts there were three treatises, the classic work of Lewin, which continues to put forth new editions, Godefroi, now almost forgotten, of which I prepared the fifth edition in 1926, and the much-cited book of Underhill, who always had the faculty of bringing a light touch to the heaviest material. To these were added, shortly before the appearance of my book, the work of my lifelong friend Professor George Keeton.

I prepared seven subsequent editions, the last appearing in 1962. In 1964 I retired from the Vinerian Chair, and during the two succeeding years served as Dean of the new Faculty of Law at the University of Biafra at Enugu/Nsukka, where I was so much occupied with administrative work that I had little time for keeping abreast of modern legislation and judicial decisions. But even before my retirement, I had made up my mind that the ninth edition should be entrusted to other hands than mine. Fortunately the obvious editor was by my side in Oxford. Professor R. H. Maudsley has been my intimate colleague, and close personal friend, over many years of academic life. Soon after the Second World War, in which he had a most distinguished military career, he was elected a Fellow of Brasenose, and joined me in my seminar classes on Cases in Equity. His thought-processes were well attuned to mine, though he always realised trends in the progress of equity which passed unnoticed by me.

Even in the hands of the original author, later editions must necessarily contain many alterations. Looking back, I can readily comprehend that the second and third editions retained far too many errors which had disfigured the book. I must have nourished in my mind a spirit of complacency, which was aggravated when the entire third edition was bought by the War Office, for study by service men desirous of pursuing a correspondence course, which I was myself asked to conduct, and which I much enjoyed. But my complacency was short-lived, for it was deservedly shattered by a devastating review by Mr. R. E. Megarry (now Mr. Justice Megarry), whom I had not then met, but who proved himself my good friend, both by his review, and by the unsparing help which he gave me in the preparation of the fourth edition, which appeared in 1946, and which, as the result of much reading and thought, relegated to limbo the flaws which had been so marked in its predecessors.

The appearance of the fifth edition in 1949 was almost simultaneous with my election to the Vinerian Chair, and I immediately started work on the sixth, which was published in 1952, to be followed by the seventh in 1957, and the eighth in 1962. In the period following the end of the Second World War, statutes and cases had been poured out in cascades, and learned articles were written, of which I must take careful account. The chapter on Charitable Trusts was rewritten in each edition. But I indeed found it necessary, even after the upheaval which produced the fourth edition, to alter the whole framework of the book. When it first appeared, I was, as a good pupil should be, a firm adherent of the gospel preached by Holdsworth, that the Judicature Acts fused together the courts which

administered law with those which administered equity, but not the systems themselves. But I gradually came to the conclusion that this view was reactionary, out of harmony with the trend of modern juristic thought, and indeed with judicial pronouncements. So in the sixth edition I pronounced myself a convert to the position that law and equity are fused, though I continue to hold—and may be accused of advancing a paradox—that the retention of equity as a separate subject of study is justified, in that in this way alone can we comprehend the nature of the operation whereby, within the framework of the totality of the legal system, there have been engrafted on to the rules of technical exactitude the principles of a morality which it has been found practicable to translate into rules of law. I was most interested, on reading the proofs of the present edition, to see that Professor Maudsley is not yet ready to abandon the older view, that the fusion has been only of the parallel systems.

I pass now to some remarks on the present edition. Equity is such a vast subject that the problem of space, carrying with it the problem of inclusion and omission, inevitably arises. Teaching methods in England and in the United States differ greatly, and in nothing more than in the separation of trusts from the rest of equity. Professor Z. Chafee, of the Harvard Law School, more than once criticised my arrangement for not observing this very separation. In the preface to my first edition, I wrote, "The law of trusts is the mainspring of equity, and to the law of trusts belongs the lion's share of treatment." The lion has become ever more voracious. Professor Maudsley always insisted that one of the most practical problems in the law of trusts was that of its relation to the law of taxation, on which he early made himself an authority. His treatment of tax avoidance, and of discretionary trusts, is entirely new, and admirably blends the academic with the practical aspect of the subject.

In order to make room for the additions on trusts, it was necessary for him, and the team who worked with him, to each one of whom I am profoundly grateful, to make excisions in other branches of equity. The pattern of the book is, indeed, heralded by the treatment of the historical introduction. In one respect it marks a complete break with my own ideas, which had tended to become far too rigid. I tended unduly to elevate the year 1925, which ushered in the new property legislation, into the rank of an eternal milestone. But since the Acts became law, forty-five years have passed, and 1925 is merely a date. Professor Maudsley's account glides deftly, and almost imperceptibly, from the old to the new. The chapters on equitable remedies have been truncated, but all essential points are preserved; in my account of specific performance, I dilated excessively on misdescriptions in a

contract of sale of land, a subject which belongs more properly to a treatise on conveyancing. Again, with the growth of the importance of trusts, administration of estates has dwindled in esteem; most *curricula* appear to omit it; and in any case the law can readily be discovered from *Williams on Executors*. So no apology need be made for the disappearance of the position of a representative who (a) carries out the contracts, (b) carries on the business, of the deceased.

In a sense, the book appears to be an entirely new book. Professor Maudsley and his colleagues have not, on the whole, attempted to transplant my *ipsissima verba* from the eighth edition, but have expressed themselves in their own phraseology. But I have been touched and flattered to find how much of my work has been preserved. In some cases, indeed, the preservation has extended to matters which I should have been inclined, if not to destroy, at any rate considerably to abbreviate. Examples are (a) the doctrines of consolidation and marshalling of mortgages, (b) the rule in *Howe* v. *Earl of Dartmouth* (1802) 7 Ves. 137, (c) the problems raised by the word " binding " in section 205 (1) (xxix) of the Law of Property Act 1925. The lesson of greater precision, learned by conveyancers over the last two or three decades, has made litigation on (b) and (c) unnecessary. I was impelled to retain (c) largely out of respect for my learned predecessor, Professor G. C. Cheshire, who, omitting it from *Modern Real Property*, referred his readers to my pages.

It rarely falls to the author of a textbook to write a foreword to a later edition; I use my opportunity to welcome the appearance of a book, which, though much altered, I can still regard as my own.

H. G. HANBURY.

Marlborough House,
Falmouth

June, 1969

PREFACE

IT is rare that an editor faces the task of editing a book which is "happily not yet an authority."[1] Some have suggested to me that this must be a difficult task. Difficult indeed it is to do justice to it. But my task has been much lightened by Professor Hanbury's willingness to put his learning and experience at my disposal while, at the same time, encouraging me to feel entirely free to make any changes I wished. This work is in continuation of over twenty years of close co-operation in the field of equity, during most of which we conducted in partnership a seminar class at the University of Oxford.

There are many changes in this edition. I will say a few words about most of the basic ones; but first let it be said that it seemed best, both to Professor Hanbury and to me, to make the changes now, with the new editor taking over, rather than try to produce a book which was at best a compromise. The result is that, while acknowledging most gratefully the contribution made by everyone who has been concerned with the preparation of this edition, I have to accept personal responsibility for all the changes that have been made.

Many great equity lawyers have said that the key to understanding equity is to understand the remedies. It has always seemed strange to me to deal with the remedies of specific performance and injunction, as is commonly done, at the end of an equity book; and they have therefore been promoted to Chapters 2 and 3. I have never thought that the discussion of a wide range of general equitable concepts—often done under the heading of Maxims of Equity—is very helpful in the early stages. Some concepts, such as that of the purchaser for value without notice, are essential, and these have come into Chapter 1. Part VII contains much of the material which previously appeared in Chapters 2 and 3, but is limited to the more important concepts. Inevitably Part VII is something of a miscellany. I regret that, but could not avoid it.

Greater emphasis, in space and in depth of treatment, is given to trusts and trustees than was done in previous editions. It is arguable that books should deal either with trusts and trustees, or with general equitable doctrines; but not with both. It is difficult to find charac-

[1] See *Nicholls* v. *Ely Beet Sugar Factory Ltd.* [1936] Ch. 343 at p. 349.

teristics which are common to everything that must appear in a book dealing with equity generally. And much of the material is included also in books on other subjects, especially contract and land law. It did not seem appropriate at this stage to do more than change the emphasis as to these subjects, for, as will be explained later, Parts VI and VII have their own *raisons d'être*. And the student should be encouraged, in my view, to cross the usual boundaries imposed by specialist courses and to think of these various matters as different aspects of property law.

Modern trust law is dominated by financial and fiscal questions. However much one may enjoy to discuss legal concepts divorced from these factors, such discussion is unrealistic. A consideration of the many developments in discretionary trusts during the past year will show this. I have therefore throughout the book attempted to deal with these matters; but in doing so, it is necessary to issue a word of warning. Each Finance Act makes changes in the law and unless annual supplements are published there is a danger that the account contained in the book will become out of date. It was my misfortune that the Finance Act 1969, making greater changes in estate duty law than any statute since 1894, should be passed when the book was in page proof; and *Re Weir's Settlement Trusts* was reversed in the same week. The account of each is necessarily superficial. The decision to introduce fiscal questions is not an attempt to turn a trusts course into a tax course; it is rather an attempt—and it is essential that the reader appreciates this—to give sufficient of the tax and estate duty background to make the modern trust law comprehensible.

It seemed useful also to include a separate chapter on powers, a subject which is becoming of increasing importance in view of the special significance of powers in discretionary trusts, and in view of the fact that neither of the two great monographs on this subject has been edited within the last half century.

Many of the problems of administration of trusts are fiscal also. The exercise, for example, of the power of maintenance and advancement is often governed by fiscal considerations; so also is the exercise of the discretion under discretionary trusts, and the power of accumulation. And an understanding of a trustee's duties in relation to investment requires some appreciation of financial factors in operation at the present day.

In all these, and other matters, I have attempted to present the law in a realistic context and to relate what the student must learn to the context in which he will practise it.

Parts V and VI deal with matters which will probably be dealt with in courses on Succession and Land Law. There is not space to deal in detail with all these questions. These chapters are intended to offer to the student an introduction to the fuller study of these subjects which he will get in a specialised course; and to do so by emphasising the principles of equity as they operate in these fields. I know how forbidding the big books on these subjects can be to a beginner, and it is hoped that these chapters will make the transition easier, whether read at the beginning of the specialist course or as preparatory reading in a previous vacation.

I am aware of the fact that the text can be criticised on the ground that subjects are dealt with unevenly; some being treated in much more depth and detail. My reply to this is that I think that students' books should discuss the theoretical aspects of appropriate subjects, but that it is not possible, because of limitations of space as well as of learning, to do so on every topic. The result is inevitably some unevenness; greater emphasis has been given to subjects in which the theoretical aspects have seemed to me to be of special interest or importance.

I have already referred to the part played by Professor Hanbury in the preparation of this edition. In Prefaces to earlier editions he has with characteristic modesty declared the debt he owes to generations of his pupils. It is time that this account was put straight; and I acknowledge with gratitude the debt which I owe to him, in common with many others of his pupils over the last forty years.

I also wish to thank a number of friends who have generously given help and encouragement: Mr. J. D. Davies, Fellow of St. Catherine's College, Oxford, has been my closest adviser throughout, and has prepared the chapters on Resulting Trusts, Charitable Trusts and those on the Doctrines, and Chapters 33 and 37, in addition to invaluable contributions to other parts of the book. Mr. S. M. Cretney, Fellow of Exeter College, Oxford, read most of the manuscript and lent his wide learning and experience in conveyancing, the administration of trusts and tax planning. Mr. E. H. Burn, Student of Christ Church, Oxford, has given to the chapters in Part VI the prompt care and attention which he gives to every project he undertakes. Professor A. K. R. Kiralfy generously solved what was to me an insuperable problem, by undertaking the preparation of Chapter 23. Dr. D. C. M. Yardley, Fellow of St. Edmund Hall, Oxford, also came to my rescue by contributing to, and advising upon, all matters connected with public law. Professor F. R. Crane of Queen Mary College, London, Professor E. H. Scammell of University College, London, Mr. J. J. Hackney of St. Edmund Hall, Oxford, and

Mr. A. Douglas Lawton of the University of Bristol have also given the benefit of their advice on particular topics. I would also like to thank Harvard School of Law and Little, Brown and Co. of Boston, Massachusetts, for permitting me to incorporate into Chapter 7 extracts from an essay of mine which was published in *Perspectives of Law* in 1964. I am most grateful also for the help given by my wife who has typed large parts of the book, and has patiently read through most of the proofs. The publishers arranged for the preparation of the tables of cases and statutes, and I prepared the index myself.

R. H. MAUDSLEY.

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June, 1969

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TABLE OF ABBREVIATIONS

Books

Dymond:	Dymond, *Death Duties* (14th ed. 1965).
Farwell:	*Farwell on Powers* (3rd ed. 1916).
Goff and Jones:	Goff and Jones, *The Law of Restitution.*
Holdsworth *H.E.L.*:	Holdsworth, *History of English Law.*
Lewin:	*Lewin on Trusts* (16th ed. 1964).
Maitland:	*Maitland's Equity* (2nd ed.).
Maudsley & Burn:	Maudsley and Burn, *Land Law: Cases and Materials.*
M. & W.:	Megarry and Wade, *The Law of Real Property* (3rd ed. 1966).
Morcom:	Morcom, *Estate Duty Saving* (4th ed. 1969).
Morris and Leach:	Morris and Leach, *The Rule Against Perpetuities.*
Nathan & Marshall:	Nathan and Marshall, *Equity Through the Cases* (5th ed. 1967).
Pettit:	Pettit, *Equity and the Law of Trusts.*
Potter & Monroe:	Potter and Monroe, *Tax Planning* (5th ed. 1966).
P. & N.:	Preston and Newsom, *Restrictive Covenants Affecting Land* (4th ed. 1967).
Snell:	Snell, *Principles of Equity* (26th ed. 1966).
Tiley:	Tiley, *Casebook on Equity and Succession.*
Waldock:	Waldock, *The Law of Mortgages* (2nd ed. 1950).

Journals

B.T.R.:	British Tax Review.
C.L.J.:	Cambridge Law Journal.
Can.B.R.:	Canadian Bar Review.
Col.L.R.:	Columbia Law Review.
Conv.(N.S.):	Conveyancer and Real Property Lawyer (New Series).
Crim.L.R.:	Criminal Law Review.
C.L.P.:	Current Legal Problems.
Harv.L.R.:	Harvard Law Review.
I.C.L.Q.:	International and Comparative Law Quarterly.
J.B.L.:	Journal of Business Law.
L.Q.R.:	Law Quarterly Review.
L.S.Gaz.:	Law Society's Gazette.
M.L.R.:	Modern Law Review.
New L.J.:	New Law Journal.
S.J.:	Solicitor's Journal.

Acts of Parliament

A.E.A.:	Administration of Estates Act.
F.A.:	Finance Act.
I.T.A.:	Income Tax Act.
L.C.A.:	Land Charges Act.
L.P.A.:	Law of Property Act.
L.P.(A.)A.:	Law of Property (Amendment) Act.
S.L.A.:	Settled Land Act.
T.A.:	Trustee Act.
T.I.A.:	Trustee Investment Act.
V.T.A.:	Variation of Trusts Act.

General

B.S.:	Building Society.
Comm.:	Commissioners.
I.R.C.:	Inland Revenue Commissioners.
R.S.C.:	Rules of the Supreme Court.
S.:	Section.
S.E.:	Settled Estates.
S.T.:	Settlement Trusts.
W.T.:	Will Trusts.

PART I

INTRODUCTION

CHAPTER 1

HISTORY AND PRINCIPLES

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1. GENERAL

EQUITY is the branch of the law which, before the Judicature Act 1873 came into force, was applied and administered by the Court of Chancery. This is "but a poor thing to call a definition," [1] and it is not intended to be one. The field of equity is delineated by a series of historical events, and not by *a priori* theory or plan; an outline of these events will be given in the next section. We will then see that, until the Judicature Act of 1873, the Court of Chancery had almost exclusive equity jurisdiction [2]; rules of equity were not enforced in the common law courts. If a defendant to a common law action had an equitable defence to it, he must stay the proceedings in the common law court and start a new action in Chancery to establish his equitable rights. This complicated system led to a number of difficulties, as we shall see. The Judicature Acts of 1873 and 1875 created the Supreme Court of Judicature, all of whose branches exercise common law and equity jurisdiction. The division between law and equity is less marked therefore than it was a century ago, but it is still necessary for various reasons to know whether a rule has its origin in law or in equity.[3]

[1] Maitland, p. 1.
[2] For the equity jurisdiction of the Court of Exchequer, see Radcliffe and Cross, *English Legal System* (4th ed.), p. 173. The Common Law Procedure Act 1854 had given common law courts a limited power to issue injunctions.
[3] *Post*, p. 15 *et seq.*

Developed systems of law have often been assisted by the introduction of a discretionary power to do justice in particular cases where the strict rules of law cause hardship.[4] In England, this was supplied by the exercise by the Chancellor of the residual discretionary power of the King to do justice among his subjects where, for one reason or another, justice could not be obtained in a common law court. Principles of justice and the insistence upon acting according to conscience are the basis of equity jurisdiction. At the present day, however, the contrast between law and equity must not be regarded as one between a system of strict rules and one of broad discretion. Equity has no monopoly of the pursuit of justice. As the common law escaped from its early formalism, equity over the years has established strict rules for the application of the principles which it developed.[5] A study of modern equity is a study of these rules, and of the principles underlying them. It will be seen that some aspects of the subject are now strict and technical, while other parts leave considerable discretion to the court.

2. Historical Outline

The long history of the Court of Chancery is a fascinating story, the details of which must be sought elsewhere[6]; it is not possible here to do more than mention, in broad outline, those aspects of the history which are essential to the understanding of modern equity.

A. The Medieval Chancellor

In the medieval period the Chancellor was the most important personage in the country next to the King himself: Maitland described him as "the king's prime minister"[7]; "the king's secretary of state for all departments."[8] One very important function of the Chancery was to issue the royal writs which began an action at law.[9] By varying existing writs or inventing new ones, the Chancellor could have some influence on the development of the law; a limited influence however, for the decision to issue a writ did not create a new

[4] The Praetor performed such a function in Roman law: Lee, *The Elements of Roman Law* (4th ed.), p. 11.

[5] Some of these principles are contained in the Maxims of Equity, for which see the 6th edition of this book (Chap. 2) and Snell, Chap. 3.

[6] Maitland Lectures I–IV; Holdsworth, *H.E.L.* i, Chap. 5; iv, pp. 407–480; v, pp. 215–338; vi, pp. 518–551, 640–671; ix, pp. 335–408; xii, pp. 178–330; xiii, pp. 574–668; xvi, pp. 5–135; Plucknett, *Concise History of the Common Law*, (5th ed.), Part V; Simpson, *An Introduction to the History of the Land Law*, Chap. 8; Yale, *Lord Nottingham's Two Treatises*; Yale, *Introduction to Selden Society*, Vols. 73 and 78; Jones, *The Elizabethan Court of Chancery*; (1965) 81 L.Q.R. 562; (1966) 82 L.Q.R. 215 (J. L. Barton).

[7] Maitland, p. 3.

[8] Maitland, p. 2.

[9] See Maitland, *Forms of Action at Common Law*.

form of action. The litigant could not proceed without it; but the common law court could still decide that the writ disclosed no claim recognised by the law.

B. Petitions to the Chancellor [10]

An injured plaintiff could only sue at common law if his complaint came within the scope of an existing writ. And in the thirteenth century the available writs covered very narrow ground. Even if the claim came within the scope of an existing writ, it may have been that for some reason, such as the power and influence of the defendant, the plaintiff could not get justice before a common law court. The King in his Council still retained wide discretionary power to do justice among his subjects, and the plaintiff could petition to the King and Council praying for a remedy. These petitions would be handled by the Chancellor and gradually in the course of the fourteenth century, the petitions began to be addressed directly to him; and by the end of the fifteenth century, the Chancellor would hear and determine the matters independently of the Council and make the decree in his own name. "From this moment we may say that the equitable jurisdiction of the Court of Chancery has come into being." [11]

C. Attitude of the Medieval Chancellors

Maitland points out that in the thirteenth and fourteenth centuries the Chancellor probably did not regard himself as administering a new body of law.[12] He was trying to give relief in hard cases, and the medieval Chancellor was peculiarly well fitted for this work. He was always an ecclesiastic, generally a bishop, and learned in the civil and canon law. The Chancellor would give or withold relief, not according to any precedent, but according to the effect produced upon his own individual sense of right and wrong by the merits of the particular case before him; no wonder that Selden could say that "Equity is a roguish thing. For law we have a measure . . . equity is according to the conscience of him that is Chancellor, and as that is longer or narrower, so is equity. 'Tis all one as if they should make the standard for the measure a Chancellor's foot." [13]

Two basic problems arose in connection with this jurisdiction. The first is that of ensuring the attendance of the defendant without the issue of a royal writ. "The Chancellor, having considered the

[10] Holdsworth, *H.E.L.* i, p. 402 *et seq.*
[11] Radcliffe and Cross, *The English Legal System* (4th ed.), p. 118; Jones, *loc. cit.*, p. 10.
[12] Maitland, p. 5.
[13] *Table Talk of John Selden* (ed. Pollock 1927), p. 43; quoted Holdsworth, *H.E.L.* i, pp. 467–468.

petition or bill as it is called, orders the (defendant) to come before him and answer the complaint. The writ whereby he does this is called a *subpoena*—because it orders the man to appear upon pain of forfeiting a sum of money—*e.g., subpoena centum librarum.*" [14] The examination will be made under oath; it need not be restricted to specific questions raised in the complaint; and issues of fact as well as issues of law will be decided by the Chancellor.

The second question is that of enforcement. If the petition is successful, the Chancellor's conclusion will usually be different from that which the common law court would have reached; otherwise the matter would have been litigated at common law. If the Chancellor says that Blackacre, owned by A, must be held to B's use,[15] and B claims possession, what can prevent A from suing at common law to establish his right by virtue of his legal title? A's right at law is undoubted; and the Chancellor cannot change the law. If the common law says that A is the owner, then the Chancellor cannot say that he is not. What the Chancellor does however is to issue an injunction to restrain A either from suing to establish his legal rights or from exercising them if they have been established. Thus in the early days it can be seen, as stated above, that the Chancellor does not regard himself as administering a body of law; but merely of interfering here and there in the interests of justice. This interference by injunction was however a substantial interference with the common law jurisdiction; and it was the subject of dispute later on.[16]

D. The Chancellor's Jurisdiction

Complaints from common law judges in the fourteenth century concerning the Chancellor's jurisdiction led ultimately to a definition of his jurisdiction and to an enhancement of his powers because they were defined. The jurisdiction was concerned with situations with which the Chancellor saw fit to interfere on grounds of justice and conscience. His authority was unquestioned in cases of fraud and breach of confidence; and, following from this, there opened up before him a most important and far-reaching sphere of jurisdiction —the enforcement of uses.

E. The Use [17]

If land is given to A on A's undertaking to hold the land to the use and benefit of B, it is unconscionable for A to keep it for his

[14] Maitland, p. 5.
[15] *i.e.*, exclusively for the benefit of B, *post*, p. 7.
[16] *Post*, p. 10.
[17] Holdsworth, *H.E.L.* iv, pp. 407–480; Ames, *Lectures on Legal History*, pp. 233–247; Plucknett, *Concise History of the Common Law*, p. 575; Simpson, *Intro-*

own benefit. B however has no claim or title to the land. The conveyance to A gives to him whatever legal estate was conveyed, and, at common law, A can exercise whatever rights that estate gives to him.

Land might be given to A to the use of B for various reasons. If B were going on a crusade, then there must be someone to perform and receive the feudal services. If B were a community of Franciscan friars which, because of the rule of poverty is incapable of holding property, it is necessary for someone to hold the land for its benefit.[18] Perhaps, however, B is trying to escape from his creditors; or fears that a conviction for felony will result in the loss of his lands.[19] For various reasons it may be advisable or necessary to put the legal title to B's land in A. If B conveys to A subject to an undertaking to hold to the use of B, B would have no protection at common law beyond that given in the fourteenth century to covenants under seal; and if a third party conveyed the land to A to hold to the use of B, no legal relationship existed between A and B.

The Chancellor interfered to compel A to hold the land for the exclusive use and benefit of B. The Chancellor cannot say that B is the owner; A is. But all the beneficial interest in the land can be given to B by compelling A to keep the legal title only, and to give all the benefit of the land to B. This is what happens when the use is enforced. And it is not long before we are saying that A is the owner at law, B the owner in equity. In the terminology of the time, A is the feoffee to uses, B the *cestui que use*. The use is the forerunner, as we will see, of the trust.

Gradually the Chancellors established the circumstances in which uses would be enforced. They had to decide also what equitable estates they would recognise; for example, if land were conveyed to A to the use of B for life and then to the use of C, should this be enforced? Broadly, the answer is that, in accordance with the maxim that equity follows the law, the estates and interests which could be created in equity corresponded with those which existed at law.

F. The Advantages of the Use

It was possible, by vesting the land in a group of adults, to avoid some feudal incidents, for example those which became payable in respect of succession by an heir to freehold land, or in respect of the tenant's infancy or marriage. It was possible also, in spite of the rule that freehold land could not be devised, to create

duction to the History of Land Law, Chap. viii; (1965) 81 L.Q.R. 562; (1966) 82 L.Q.R. 215 (J. L. Barton).

[18] Maitland, p. 25; Holdsworth, *H.E.L.* iv, p. 415.

[19] *Davies* v. *Otty* (*No.* 2) (1865) 35 Beav. 208.

effective dispositions of equitable interests on death by vesting the land in feoffees and declaring the uses on which the land was to be held after the settlor's death. Further, uses made possible new methods of conveyancing,[20] and also the creation of new types of interests in land which were not possible at common law.[21] For a time also, until prevented by statute, land held to uses could be enjoyed by religious houses in defiance of the Statutes of Mortmain,[22] or be placed beyond the reach of creditors.

G. The Statute of Uses 1535

Henry VIII found that his purse was being emptied by the evasions of feudal incidents which the system of uses made possible. To small tenants who had no tenants of their own, the system of uses was entirely beneficial. To larger landowners, it was beneficial in so far as they were tenants, and harmful in so far as they were lords. To the King, it was entirely harmful, because he was lord to all and tenant of none. The first part of Henry VIII's reign had been expensive, and he was determined to restore the revenues of the Crown by attacking uses. The Statute of Uses was intended to reduce greatly the scope of the use. After a grandiloquent preamble[23] it provided, according to Maitland's summary of the first clause[24]: "where any person or persons shall be seised of any lands or other hereditaments to the use, confidence, or trust of any other person or persons, in every such case such person and persons that shall have any such use, confidence or trust in fee simple, fee tail, for term of life or for years or otherwise shall stand and be seised deemed and adjudged in lawful seisin estate and possession of and in the same lands and hereditaments in such like estates as they had or shall have in the use." In other words, the feoffees to uses were to disappear. The *cestui que use* was to have the legal estate.

The Statute did not however suppress all uses.[25] It only applied where the feoffee was *seised* to the use of another. If the feoffee held only a term of years, he would not be seised, and the Statute would not apply. Again it did not apply to situations where the

[20] *i.e.*, the bargain and sale—an agreement for consideration to sell land to a purchaser raised a use in the purchaser's favour.

[21] *e.g.*, springing and shifting interests; M. & W., pp. 169, 195; Cheshire, pp. 72, 219.

[22] Which forbade the conveyance of land to religious houses without permission of the Crown.

[23] Discussed in *H.E.L.* iv, pp. 460–461, and described as: "far from being a sober statement of historical fact. Rather it is an official statement of the numerous good reasons which had induced the government to pass so wise a statement—the sixteenth century equivalent of a leading article in a government newspaper upon a government measure."

[24] Maitland, p. 35.

[25] Holdsworth, *H.E.L.* iv, pp. 467–473.

feoffees had active duties to perform. The feoffees were then necessary participants, and the Chancellor held that a duty to sell the land, or to collect the rents and profits of the land and pay them to X, was a sufficiently active duty to exclude the Statute.[26]

H. A Use upon a Use. The Trust

It was possible, after the Statute, to create equitable interests in land by imposing a use upon a term of years, or by requiring the legal owners of freehold land to collect the rents and profits and to pay them over to the beneficiaries. Such uses were not executed; nor were they invalid.[27] Passive uses of freehold land were however a different matter. Such a use was executed by the Statute. What would happen if a second use were imposed? If land were limited to A to the use of B to the use of C, is it possible to argue that the first use will be executed, and that B will hold the legal estate to the use of C? Such a solution was reached by about 1700[28]; the second use is called a trust. A shorter form, which became settled practice, was to omit A, and to make the disposition "unto and to the use of B in trust for C."

The story of this development is confused and uncertain. Most accounts start with the proposition that through the sixteenth century, the second use was repugnant to the first, and void.[29] It was then said that the turning-point came with *Sambach* v. *Dalston* in 1634[30]; but this is now discredited,[31] and the present view is that the change came at the end of the sixteenth century.[32] Barton[33] however denies this and says that "the trust of freehold was an accepted institution at any rate in the latter part of the sixteenth century."[34] However that may be, it is clear that after the Restoration in 1660, a number of factors combined to facilitate the recognition of passive trusts of freeholds. The abolition of military tenures[35] and the consequent freedom to devise all freehold land,[36] the reduction in the value of money which followed the development of the New World, and the changes in the constitutional and financial structure of the country in the seventeenth century, all helped to

[26] Maitland, pp. 38–41; M. & W., pp. 163–166.
[27] Simpson, *Introduction to the History of Land Law*, pp. 182–183.
[28] Simpson, *loc. cit.*, p. 191.
[29] Plucknett, *Concise History of the Common Law*, pp. 600–601; Simpson, *loc. cit.*, p. 188 *et seq.*; *Jane Tyrrel's Case* (1557) Dyer 155a.
[30] (1634) Tothill 188.
[31] (1958) 74 L.Q.R. 550 (J. E. Strathdene).
[32] Simpson, *loc. cit.*, pp. 190–191.
[33] (1966) 82 L.Q.R. 215 (J. L. Barton).
[34] *Ibid.* at p. 221.
[35] Tenures Abolition Act 1660.
[36] Previously only two-thirds of land held by knight service could be devised.

make the collection of feudal dues a minor factor in the royal revenues. There was now no reason of policy why passive trusts of freeholds should not be enforced as were active trusts and trusts of leaseholds. The enforcement of the second use as a trust was so similar to that of the enforcement of the use against a feoffee to uses centuries before that Lord Hardwicke was able to say, in 1738, in a remark of greater dramatic power than legal or mathematical accuracy: ". . . by this means a statute made upon great consideration, introduced in a solemn and pompous manner, by this strict construction, has had no other effect than to add at most, three words to a conveyance." [37]

I. The Struggle over Injunctions

The story of the use and of the trust has taken us away from the chronological sequence. For it was at the close of the sixteenth century that the quarrel over the power of the Chancery to issue injunctions came to a head. The orthodox view is that the clash was inevitable.[38] The use of the injunction had the effect of rendering the common law inoperative; no wonder that the Chancellor was charged that he left " the common law of the realm, and you presume much upon your own mind, and think that your conceit is far better than the common law." [39] That the clash did not come earlier was due partly to the statesmanlike qualities of men like More; and no doubt also to the reluctance to challenge the powers of royal officers in Tudor times. Chief Justice Coke was not willing to see the common law treated in this way, and in a number of cases decided that imprisonment for disobedience to injunctions issued by Chancery was unlawful.[40] In one case it was said that " if any court of equity doth inter-meddle with any matters properly triable at the common

[37] *Hopkins* v. *Hopkins* (1739) 1 Atk. 581 at p. 591; see Holdsworth, *H.E.L.* iv, p. 449 *et seq.*

[38] See, however, Jones, *The Elizabethan Court of Chancery*, p. 22 *et seq.* He points out that common law judges often sat in Chancery, and that the legal structure of England was a single institution, and not just a set of disjointed parts. Disputes between the parts could arise for various reasons—competition over jurisdiction, fees, privileges, and these disputes " could be exacerbated by personal infelicities. . . . The seventeenth-century dispute between Egerton [Lord Ellesmere] and Coke, which must not be exaggerated, has its origins in the inability of sensitive men to escape from a wooden deference to their own accustomed procedures, methods and modes of argument. This was one of the most senseless quarrels ever to be staged between two such outstanding intelligences, and even James I, part fumbling and part devious, had the wit to perceive this."

[39] Reply of a serjeant to the Doctor and Student, *Harg. Law Tracts* 323 at p. 328, quoted Holdsworth, *H.E.L.* i, p. 460.

[40] *Heath* v. *Rydley* (1614) Cro.Jac. 335; *Bromage* v. *Genning* (1617) 1 Rolle 368; *Throckmorton* v. *Finch* (1598) Third Institute 124 at p. 125; Holdsworth, *H.E.L.*, i, p. 461.

law, or which concern freehold, they are to be prohibited."[41] Coke further argued that the jurisdiction of the Chancellor was contrary to the Statute of Praemunire of 1353[42] and also to a statute of 1402.[43] Lord Chancellor Ellesmere, equally determined, claimed that he was in no sense interfering with the common law; he was merely acting *in personam* directing the individual that, on equitable grounds, he must not proceed to sue at law or enforce a judgment already obtained at law.

James I stepped in and referred the matter to Bacon,[44] then Attorney-General, and others learned in the law. Acting on their recommendations, and no doubt in accordance with his own political views and interests, he decided in favour of the Chancery.[45] The victory did not remain long unchallenged. The success of the Parliament and of the common lawyers in the political struggles of the seventeenth century provided further impetus for the attack on the Chancery. As late as 1690, following the Revolution, a Bill was introduced in the House of Commons to restrain the interference by Chancery in any suit for which the proper remedy was at common law.[46] The Bill was not passed, and from that time the Chancellor's jurisdiction was not seriously challenged.

J. Transformation of Equity into the Modern System[47]

From the beginning of the Chancellorship of Lord Nottingham in 1673 and to the end of that of Lord Eldon in 1827, equity was transformed from a jurisdiction based upon the personal interference of the Chancellor into a system of established rules and principles. We have seen that the early Chancellors were ecclesiastics. Lawyers and others were sometimes appointed during the Tudor and Stuart periods. But the retirement of Lord Shaftesbury[48] in 1672 was the last occasion on which a non-lawyer held the Great Seal. This factor influenced the development of the system into one based on rules and precedents rather than on individual conscience. The first reported Chancery cases are dated 1557[49] and these cases are treated as authorities and followed.[50]

[41] *i.e.*, liable to be subject to the writ of Prohibition: *Heath* v. *Rydley* (1614) Cro.Jac. 335.
[42] 27 Edward III, St. 1, c. 1.
[43] 4 Henry IV, c. 23.
[44] For Bacon's remarkable career, see Holdsworth, *H.E.L.* v, pp. 238–254.
[45] *Reports of Cases in Chancery*, App. 1, p. 14 *et seq.*
[46] Holdsworth, *H.E.L.* i, pp. 463–465.
[47] Pollock, *Essays in Legal History*, p. 286.
[48] A member of the Cabal of Charles II; he had been educated as a lawyer, but never practised; Holdsworth, *H.E.L.* i, p. 411; vi, pp. 525–526.
[49] "Choyce Cases in Chancery"; Holdsworth, *H.E.L.* v, pp. 274–278; Jones, *The Elizabethan Court of Chancery*, p. 3.
[50] In the preface to Nelson's reports, the author said that, "Equity became artificial reason, and hath ever since such a mixture of law in it, that it would be much

Lord Nottingham did much to weld together, consolidate and stiffen the whole system. To him we owe the doctrine that there can be no "clog on the equity of redemption,"[51] a classification of trusts,[52] and the modern rule against perpetuities.[53] From the end of the seventeenth century, and throughout the eighteenth century, equity, in a period of legislative stagnation, became the great force that moulded the progress of the law right up to the beginning of the nineteenth century. In this period the modern law of trusts develops and is shaped to meet entirely new conditions of social life; equity took in hand the administration of the estates of deceased persons, on which depend the doctrines of election,[54] satisfaction,[55] ademption,[56] marshalling of assets,[57] and performance.[58] In this period there were many great Chancellors, Talbot (1733–37), Hardwicke (1737–60), Camden (1766–71), Thurlow (1778–93), culminating in Lord Eldon (1801–06, 1807–27), one of the greatest of equity lawyers. His decisions were thorough, painstaking, learned and clear. As Holdsworth said: "He had a thorough grasp of existing rules and principles; but he looked as anxiously into all the facts and circumstances of each case . . . as if there were no such rules and as if, therefore, he was under the necessity of determining each case as one of first impression."[59] The judgments were masterly. But it is hardly surprising that the business of the court was scandalously in arrears. The pattern and principles of equity were now established. "Nothing would inflict on me greater pain in quitting this place," he said, "than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor's foot."[60]

K. The Nineteenth Century and the Judicature Acts 1873 and 1875

The nineteenth century was a period of great development of the equitable jurisdiction, based upon the principles established by the end of Lord Eldon's tenure. The enormous industrial, international and imperial expansion of Britain in this period necessitated

easier now for a lawyer to preach, than for a prelate to be a judge of that court"; Holdsworth, *H.E.L.* vi, p. 669.

51 *Howard* v. *Harris* (1681) 1 Vern. 33; *post*, p. 546.

52 *Cook* v. *Fountain* (1676) 3 Swan. 585; Nathan & Marshall, No. 17. See Holdsworth, *H.E.L.* vi, pp. 545–548, 643.

53 *Duke of Norfolk's Case* (1683) 2 Swan. 454. For a collection of Lord Nottingham's Cases, see Yale, *Introduction to the Selden Society*, Vols. 73 and 78.

54 *Post*, p. 476 *et seq.*

55 *Post*, p. 490 *et seq.*

56 *Post*, p. 462.

57 *Post*, p. 558.

58 *Post*, p. 486 *et seq.*

59 Holdsworth, *H.E.L.* i, p. 468; Dickens, *Bleak House*, Chap. 1.

60 Holdsworth, *H.E.L.* i, pp. 468–469; *Gee* v. *Pritchard* (1818) 2 Swan. at p. 414.

developments in equity to deal with a host of new problems. The accumulation of business fortunes required rules for the administration of companies and partnerships; and the change in emphasis from landed wealth to stocks and shares necessitated the development of new concepts of property settlements.

Clearly the old organisation of the Chancery Court, overloaded in Lord Eldon's time, could not hope to deal with the mass of business. "Remember this," said Maitland to his students at the turn of the twentieth century, "that until 1813 there were only two judges in the Court of Chancery. There was the Lord Chancellor, and there was the Master of the Rolls, and it was but by degrees that the latter had become an independent judge; for a long time he appears merely as the Chancellor's assistant.[61] In 1813 a Vice-Chancellor was appointed. In 1841 two more Vice-Chancellors. In 1851 two Lords Justices of Appeal in Chancery. When the Court was abolished in 1875, it had seven judges. Cases in the first instance were taken before the Master of the Rolls, or one of the three Vice-Chancellors, and there was an Appeal Court constituted by the Chancellor and the two Lords Justices; but the Chancellor could sit as a judge of first instance if he pleased and sometimes did so."[62] At least however, the judges and Chancery officials could deal with their work without the fear of opposition from the common law. The two courts had now become, "not rivals but partners in the work of administering justice."[63] The time had come for the fusion of these jurisdictions into a single Supreme Court.

Some limited steps were taken towards this fusion in the middle of the nineteenth century. The Common Law Procedure Act 1854 gave to the common law courts a certain power to give equitable remedies, and the Chancery Amendment Act 1858, commonly known as Lord Cairns' Act, gave to the Court of Chancery power to award damages in addition to, or in substitution for, an injunction or a decree of specific performance. The major change however came with the Judicature Acts 1873 and 1875. These Acts abolished the old separate Courts of Queen's Bench, Exchequer, Common Pleas, Chancery, Probate, the Divorce Court, and the Court of Admiralty; it created the Supreme Court of Judicature with a High Court divided into Divisions known as the Queen's Bench Division,

[61] For a modern and detailed account of the position of the Master of the Rolls as an administrative officer, see Jones, *The Elizabethan Court of Chancery*, pp. 51–58.

[62] Maitland, p. 14. There are now nine puisne judges allocated to the Chancery Division.

[63] Holdsworth, *H.E.L.* v, p. 668.

Chancery Division, and the Probate, Divorce and Admiralty Division; and each Division carried both legal and equitable jurisdiction.[64] Thus any issue could be adjudicated in any Division; and any point of law or equity can be raised and determined in any Division; but, for the sake of administrative convenience, cases are allocated to the Divisions according to their general subject-matter.[65]

The Judicature Act 1873 also provided, in the first ten subsections of section 25, for the solution to many problems in which the rules of law and equity would be in conflict.[66] Subsection (11) was a residual provision, covering all other possible cases of "conflict or variance," and laying down that the equity rule should prevail. The leading case on the effect of the Judicature Act is *Walsh* v. *Lonsdale*.[67]

> The landlord (defendant) entered into an agreement in writing to grant to the tenant (plaintiff) a lease of a mill for seven years. The agreement provided that the rent was payable in advance if demanded. No grant by deed of the lease—as required for the grant of a lease exceeding three years *at law*—was ever made.
>
> The tenant entered and paid rent quarterly, not in advance. He became in arrears and the landlord demanded a year's rent in advance. It was not paid, and the landlord distrained. The tenant brought this action for illegal distress.[68]
>
> The action failed. The distress would have been illegal at law, because no seven-year lease had been granted, and the yearly legal tenancy which arose because of the entering into possession and payment of rent did not include the provision for payment of rent in advance.[69] In equity, however, the agreement for the lease was as good as a lease, and the tenant was held liable to pay a year's rent in advance.

64 Judicature Act 1873, s. 24. See *Re Hastings* [1958] 1 W.L.R. 372; *Re Hastings* (*No.* 2) [1959] 1 Q.B. 358; *Re Hastings* (*No.* 3) [1959] 1 W.L.R. 807, affirming [1959] Ch. 368, for an interesting modern problem in the relationship between the jurisdiction of the constituent parts of the High Court.

65 See Judicature Act 1925, s. 56, replacing J.A. 1873, s. 34; *post*, p. 28.

66 Now Judicature Act 1925, s. 44; *Job* v. *Job* (1877) 6 Ch.D. 562; *Lowe* v. *Dixon* (1885) 16 Q.B.D. 455; *Berry* v. *Berry* [1929] 2 K.B. 316; *Mitas* v. *Hyams* [1951] 2 T.L.R. 1215.

67 (1882) 21 Ch.D. 9; Tiley, p. 12.

68 A landlord may distrain (*i.e.*, issue a distress) upon a tenant who is in arrear, and in doing so may take and sell sufficient goods of the tenant (with exceptions) as are necessary to pay the arrears; M. & W., p. 695.

69 Because a yearly tenancy which arises in these circumstances includes only such terms of any agreement as are consistent with a yearly tenancy. An agreement to pay a year's rent in advance is not consistent because the yearly tenancy can be terminated by giving six months' notice: M. & W., p. 640.

It will be seen that the effect of the Act is procedural only.[70] The rights of the parties, whether dependent on the rules of law or of equity, were under the Act determined at a single trial. But the same result would ultimately have been reached if the case had arisen before 1875; the procedure only would have differed. The claim, being one for damages for illegal distress, would have been brought at common law. In reply to the tenant's argument that he held only on a lease from year to year, of which the covenant to pay rent a year in advance was not a term, the landlord could not have answered by claiming specific performance of the agreement to take a lease. That argument could only have been made in equity. The landlord would have had to obtain an injunction to stop the tenant's action, then to obtain specific performance of the agreement; and then to have returned to the common law court with the lease duly sealed by the tenant in conformity with the decree of Chancery. Then the landlord would have had a good defence. The effect of the Judicature Acts was to enable the court to treat as done that which ought to be done and to allow the landlord to use his equitable defence (based on his right to specific performance) to the common law claim.

Whether developments in the ninety-odd years since the Judicature Acts have had the effect of fusing, not only the jurisdictions but law and equity themselves[71] is a disputed question which can best be considered after looking further into the nature of equitable rights.

3. The Nature of Equitable Rights

The key to understanding the nature of equitable rights is the appreciation of the importance of the maxim that "Equity acts *in personam*." This has been the basis of the jurisdiction from the earliest days; and is so today. The use has its origin in the insistence of the Chancellor that the feoffees to uses should administer the property in a particular way—to the use and benefit of the *cestui que use*. Similarly with the trust. "Equity did not say that the *cestui que trust* was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the *cestui que trust*."[72]

Indeed equity could not have done differently. Its remedies of specific performance and injunction were not decrees *in rem*.[73] They ordered the defendant to do something or to refrain from doing

[70] See (1966) 4 Alberta L.R. 134 (J. E. Coté).
[71] (1961) 24 M.L.R. 116 (V. T. H. Delany).
[72] Maitland, p. 17.
[73] *Post*, p. 33.

something; and behind them was the threat that a recalcitrant defendant would be put in prison for contempt if he refused.

There is no space here to run through every aspect of equity jurisdiction to establish this point. The reader is invited to bear it in mind whenever any question of equitable rights or interests arises during the course of this book. It will be seen on every occasion that equity is acting *in personam*. One practical application of this proposition is the fact that a court of equity will exercise jurisdiction to decree specific performance of a contract for the sale of land abroad [74]; or to administer assets abroad if the executors are in England [75]; or to restrain a mother, who was a British subject and ordinarily resident in England and who had been served while in U.S.A. under R.S.C., Order XI, r. 1,[76] from keeping abroad her children who had been made wards of court.[77]

This is not to say that it is not correct to speak of equitable ownership. Quite the opposite. The beneficiary is the equitable "owner" of the property owned at law by the trustees. This is obvious in cases of assessment for tax.[78] Ownership is a flexible term.[79] While rights of ownership are said to be valid against other people generally, contractual rights and other choses in action are good only against the other party. The beneficiary under the trust has the right, albeit a right *in personam*, to compel his trustee to apply the property wholly for his benefit; but his right is not only against that individual trustee, but against anyone else in the world who becomes the owner at law of the property, with the exception only of the bona fide purchaser of the legal estate for value without notice.[80] The possible appearance of such a person is not sufficient to prevent the interest of the beneficiary from being correctly described as proprietary.[81] It is, however, as we shall see, a good reason for saying that equitable rights are not always the same in their effect as legal rights.

This approach makes it possible to submit that much of the discussion [82] on the question whether equitable rights are rights

[74] *Penn* v. *Lord Baltimore* (1750) 1 Ves.Sen. 444; *Richard West and Partners (Inverness) Ltd.* v. *Dick* [1969] 2 W.L.R. 383; affirmed [1969] 2 W.L.R. 1190; *post*, p. 34.

[75] *Ewing* v. *Orr-Ewing* (*No.* 1) (1883) 9 App.Cas. 34.

[76] It permits the service of a writ in certain cases upon a person who is out of the jurisdiction.

[77] *Re Liddell's Settlement* [1936] Ch. 365.

[78] *Baker* v. *Archer-Shee* [1927] A.C. 844; Nathan & Marshall, No. 2: *cf. Schalit* v. *Joseph Nadler Ltd.* [1933] 2 K.B. 79; Nathan & Marshall, No. 1.

[79] *Oxford Essays in Jurisprudence*, p. 107 *et seq.* (A. M. Honoré).

[80] *Post*, p. 21.

[81] See *Re Cuff-Knox* [1963] I.R. 263, especially at pp. 289–290. See Jackson, *Principles of Property Law*, pp. 55 *et seq.*, 83.

[82] Maitland, pp. 16–20, 152 *et seq.*; Hohfeld, *Fundamental Legal Conceptions*, pp. 115–122, 152–153, 155–159.

in rem or rights *in personam* is not meaningful. To argue that ownership is a right *in rem*; that rights *in rem* are enforceable against all the world; and that, because of the possible appearance of a bona fide purchaser, equitable rights are not rights *in rem* and therefore not ownership, is to base the argument on a false premise.[83] First, legal rights of ownership are not good against all the world. There are many ways in which the legal owner of a chattel or chose in action may be involuntarily deprived of his legal ownership.[84] Secondly, a beneficiary under a trust may have better protection by reason of the equitable doctrine of tracing trust funds than he would have if he were a legal owner.[85] In other words, it is not profitable to determine the *jus in rem/jus in personam* argument by counting up the numbers of people who are affected by the person's rights. Nor does it seem that the argument itself contains the substance thought to attach to it in past decades.

The same observation may also be made of the argument whether law and equity conflict.[86] In a sense they do; a trustee is not at liberty to destroy trust assets which he could do if his responsibilities as trustee suddenly vanished. But the systems do not clash. A *modus vivendi* has been worked out by which the justification for equitable intervention is accepted by the common law. Equity does not intervene without stating its ground for doing so, and both the extent and the manner of that intervention are governed by the nature of the ground.[87] To elaborate the matter jurisprudentially is not really to take it much further.

4. The Relationship between Law and Equity: Fusion

The so-called "fusion" of law and equity raises problems of greater import, however. The problems that arise here are not ones just of commenting on and classifying equitable rights. Fusion could lead to significant changes in the substance and formulation of the resulting rules, if it were a principle capable of general application. What, then, is the principle of fusion?

From what has been said so far, it should be clear that law and equity now work together as parts of a consistent whole. Indeed, "Equity had come not to destroy the law, but to fulfil it."[88] Thus

[83] See (1917) 17 Col.L.R. 269 (A. W. Scott); (1962) 40 Can.B.R. at p. 270 *et seq.*
[84] Sale of Goods Act 1893, ss. 22–25; Factors Act 1889, ss. 2, 8, 9; Hire-Purchase Act 1964, Part III.
[85] *Post*, p. 414 *et seq.*
[86] See (1966) 4 Alberta L.R. 134 (J. E. Cote).
[87] A good example is provided by mistake; *post*, p. 655 *et seq.*
[88] Maitland, p. 19.

section 25 (11) of the Judicature Act 1873 was not immediately dynamic in preferring equity to law when they conflicted.[89]

Law and equity are both applied in each Division of the High Court. The court and practitioners are faced with the necessity of pooling together the sum of the resources of the two systems, and aiming at a composite result. But this is really no more than saying that the *jurisdictions* are fused. Indeed, this process is just what happened in *Walsh* v. *Lonsdale*.[90]

But can more be said? The orthodox view is No. The *systems* are not fused, or amalgamated, merely because their administration has been. There is still a great deal of difference between legal and equitable rights and duties, in terms particularly of their consequences. The clue, according to the orthodox theory, lies in the continued separation of remedies. For a situation attracting a common law remedy, that common law remedy is available; for a situation attracting an equitable remedy, that equitable remedy is available. Thus for fraudulent misrepresentation at law, the common law remedy of damages was available; equity also held its remedy of rescission available in such circumstances. But equity would also hold rescission available for an innocent misrepresentation. It did not at all follow that damages were available for innocent misrepresentation, or for "fraud in equity."[91] The Judicature Act made no change here. Rescission and damages could both be granted in any court where it was proper to grant them. But it was still only proper to grant them in cases where they could have been granted before the Act by some court. No court could have awarded damages for innocent misrepresentations before the Act; the position was in no way changed by the Act.[92] Similarly for contracts induced by undue influence[93]; equity might set them aside, but no damages could be awarded unless a separate common law ground of doing so existed as well.

But there are many modern statements to the effect that we ought to be addressing our minds to the combined *effect* of the systems of law and equity, and that to keep the systems always distinct is pedantic, and an impediment to the natural development of the law.[94] This may indeed be so, but it is difficult to see that, by a change in words

[89] See Tiley, p. 21.

[90] (1882) 21 Ch.D. 9, *ante*, p. 14. *Cf. Britain* v. *Rossiter* (1883) 11 Q.B.D. 123.

[91] *Post*, p. 650.

[92] Any doubts on this matter did not survive *Derry* v. *Peek* (1889) 14 App.Cas. 337. Negligent misrepresentations are now of course dealt with by the Misrepresentation Act 1967; *post*, p. 655.

[93] See *Allcard* v. *Skinner* (1887) 36 Ch.D. 145.

[94] See the examples discussed below, and note also the remarks of Lord Evershed in *The Court of Appeal in England*, p. 13. *Cf.* (1961) 24 M.L.R. 116 (V. T. H. Delany).

or by a stroke of a pen, the distinction between rules leading to one set of remedies and rules leading to another set can just disappear. What really matters is that, when the overall effect of the rules is being questioned, reform should not be hindered by an attachment to a divisory grouping which is more hallowed than needed.

But it is possible to see that in some areas, the distinction between legal and equitable rules is already becoming of less significance. These areas are of great jurisprudential interest in that they point the way to a future stage in which it may indeed be accurate to say that the rules and not only the administration of law and equity are fused. When such a stage is reached, it would certainly be right to say that a " principle " of fusion had prevailed. But it is not accurate to generalise from these instances and conclude that fusion in this sense has already combined the systems into one. Some illustrations may now be given of cases where a limited fusion has taken place.

In *Boyer* v. *Warbey,*[95] the question arose whether covenants in a lease that touched and concerned the land bound assignees, not only where the lease had been sealed, but also where the lease was a valid oral lease (being for less than three years) or where there was a written agreement for a lease for more than three years which was enforceable in equity. The Court of Appeal held that, whatever the position before 1875, this was not an area where distinctions based on formalities were now acceptable, and that the covenants should bind. Whether it was law or equity that regarded the lease as effective, the rule as to the running of covenants should be the same. In a limited sense this is " fusion " in that the reasons why a particular lease is effective are ignored in favour of a uniform consequential rule.

In *Australian Blue Metal Ltd.* v. *Hughes,*[96] a question arose concerning the form of notice that might be required for a party to a certain type of obligation to resile from it. Common law approached the question by implying a need for reasonable notice, equity by allowing a reasonable period of grace. In the view of the Privy Council, such a theoretical distinction should not lead to different results. The only test was that of what was reasonable and fair between the parties, and nothing here depended on whether the origin of the protection was legal or equitable. In consequence, the rule can be fully stated without reference to its origins.

A more controversial example concerns estoppel in equity. Consideration is required for an agreement to vary or discharge an existing obligation, but a person who acts on such an agreement entered into

[95] [1953] 1 Q.B. 234, especially at pp. 245–247 *per* Denning and Romer L.JJ.; *post*, p. 53.

[96] [1963] A.C. 74, especially at pp. 101–102 *per* Lord Devlin.

without consideration may in certain circumstances be protected in equity. That protection may not however be as complete or permanent as if consideration were present,[97] a factor which suggests that the effects of the common law and equitable rules cannot be stated as one unitary rule. A permanent and a temporary protection cannot be "fused." The attempt of Denning L.J.[98] to accomplish a fusion in this area of the law is really an attempt to subsume various rules under a general principle that promises intended to be acted on, and in fact acted on, have a binding effect. Such a general principle might be welcome, and might also have the welcome consequence that the degree of protection to be conferred would be determined on the merits of the case and not on the ground of protection being at law or in equity. But the existing body of case-law in fact does take that distinction, however regrettable it may be.

A striking example of fusion occurs in *Seager* v. *Copydex Ltd.*[99] The defendants had used a technical idea communicated to them in confidence by the plaintiff in marketing a carpet grip. Equity's familiar remedies to protect a plaintiff abused in this manner are account and injunction. But the circumstances of this case suggested that the most just solution was an assessment of damages. Can an action for damages lie, however, for a breach of confidence, which is protected only in equity? The Court of Appeal held that the appropriate remedy must be granted; fictions of implied contracts or notional injunctions were not now necessary [1]; damages were thus ordered to be assessed.

But it would be premature to see in this last example proof that the notion of restitution had already prevailed over, and fused, legal and equitable remedies on a large scale. That again may be a desirable result to aim at, but it still lies in the future.[2] Rationalisation of the extremely unsatisfactory rules governing the recovery of money, which derive from notions of quasi-contract, constructive trust and tracing, may indeed depend on dispensing with these distinctions and formulating principles conceived on other bases. The combined effect of the rules may well be more rational when stated without a

[97] *Post*, p. 671.

[98] See particularly *Charles Rickards Ltd.* v. *Oppenheim* [1950] 1 K.B. 616 at p. 623.

[99] [1967] 1 W.L.R. 923.

[1] *i.e.*, to enable damages to be granted in lieu. See *Seager* v. *Copydex Ltd.*, *supra*, at pp. 931–932. *Cf. Nicrotherm Electrical Co. Ltd.* v. *Percy* [1957] R.P.C. 272.

[2] *Cf.* Denning J. in *Nelson* v. *Larholt* [1948] 1 K.B. 339 at p. 343, and in *Reading* v. *R.* [1948] 2 K.B. 268 at 275 with Lord Porter's remarks in the latter case in the House of Lords [1951] A.C. 507 at pp. 513–514. An example of fusion in this area of the law may perhaps be found in the reasoning of Atkin L.J. in *Banque Belge* v. *Hambrouck* [1921] 1 K.B. 321 at pp. 327–328, but the ratio of the case is not easy to determine.

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subdivision into law and equity. Accordingly, this area of the law affords a strong example [3] of the way in which a "principle" of fusion needs to be borne in mind when considering long-term projects of reform.

5. The Bona Fide Purchaser of the Legal Estate for Value without Notice

As we have seen, the use was enforceable against the feoffee to uses because the feoffee's conscience was bound by the undertaking which he had given to hold the property to the use and benefit of the *cestui que use*. Similarly with a trustee and beneficiary. So long as the same person remained trustee, this theory works quite simply. But if the legal estate passes from him to another person, how is the conscience of the transferee affected? The question is then one of determining, as a matter of policy, whether this new holder of the legal estate is to be bound by the trust.[4] Any way in which the equitable ownership of a beneficiary is destroyed is of course a serious weakening of the position of the beneficiary; this equity strives to prevent.[5]

Thus, a trust is binding on a person to whom the trustee gave the property [6]; or a mere occupier [7] or disseisor [8]; and also on a purchaser who bought it if he knew or could by reasonable inquiries have found out about the existence of the trust.[9] In short, the trust is binding on everyone coming to the land except the bona fide purchaser of a legal estate for value without notice actual, constructive or imputed. "Such a purchaser's plea of purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this Court. Such a purchaser . . . may be interrogated and tested to any extent as to the valuable consideration which he has given in order to shew the *bona fides* or *mala fides* of his purchase, and also the presence or absence of notice; but when once he has gone through that ordeal, and has satisfied the terms of the plea of purchase for valuable consideration without notice, then, according to my judgment, this Court has no jurisdiction whatever to do anything more than let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained, whatever it may

[3] Mistake, infants, and covenants running with land are other obvious examples.
[4] Maitland, p. 111 *et seq*. The principles here discussed are those which developed before the days of registration of title. Different principles apply to registered land.
[5] *Ibid*. at p. 220.
[6] *Re Diplock* [1948] Ch. 465, at pp. 544–545; Tiley, p. 349.
[7] *Mander* v. *Falcke* [1891] 2 Ch. 554.
[8] *Re Nisbet and Pott's Contract* [1906] 1 Ch. 386; affirming [1905] 1 Ch. 391; Tiley, p. 22.
[9] *Pilcher* v. *Rawlins* (1872) L.R. 7 Ch.App. 259; Tiley, p. 29.

be. In such a case, a purchaser is entitled to hold that which, without breach of duty, he has had conveyed to him." [10]

Some aspects of this doctrine need to be examined in detail.

A. Purchaser for Value

The purchaser must have given consideration in money, or money's worth,[11] or the consideration of marriage.[12] Otherwise he is a donee, and bound by the trust regardless of notice. A purchaser includes a mortgagee [12a] or lessee.

B. Legal Estate

This doctrine is based on the maxim that when the equities are equal the law prevails. In the case of a purchase of a legal estate for value without notice, the equities are equal between the purchaser and the beneficiaries; the purchaser's legal estate is allowed to prevail.

The position is different where the purchaser is a purchaser of an *equitable* interest only. The competition then is between two equitable interests; and the rule here is that the first in time prevails.[13]

There is, however, as we shall see, a situation in which the precedence given to a purchaser for value applies to the case of a purchaser of an equitable interest. This is so where the competition is between the purchaser of an equitable interest for value without notice and a person claiming to be entitled to a mere equity. A mere equity is thus distinguished from an equitable interest.[14] Whether or not mere equities are binding on third parties is uncertain; in so far as they may be binding, it should be added that by a parallel rule to that of a bona fide purchaser of a legal estate for value without notice taking free of an equitable interest, so a bona fide purchaser of an equitable interest for value without notice takes free of a mere equity.[15]

C. Notice

i. Meaning of Notice. Apart from legislation [16] a purchaser can only substantiate this plea if he can show that " he took all reasonable

[10] *Per* James L.J. in *Pilcher* v. *Rawlins*, *supra*, at pp. 268–269.
[11] *Thorndike* v. *Hunt* (1859) 3 De G. & J. 563.
[12] *i.e.*, a future marriage. An ante-nuptial settlement is deemed to be made for value in respect of the spouses and the issue of the marriage, *post*, p. 40.
[12a] *Caunce* v. *Caunce* [1969] 1 W.L.R 286.
[13] *Phillips* v. *Phillips* (1862) 4 De G.F. & J. 208 at p. 218; Tiley, p. 28; *Re Morgan* (1881) 18 Ch.D. 93; *post*, p. 697.
[14] *Post*, p. 695 *et seq.*
[15] *National Provincial Bank Ltd.* v. *Ainsworth* [1965] A.C. 1175 at p. 1238, *per* Lord Upjohn. *A fortiori* a purchaser of the legal estate: *Smith* v. *Jones* [1954] 1 W.L.R. 1089.
[16] Especially L.C.A. 1925, *post*, p. 25.

care and made inquiries, and that, having taken that care and made inquiry, he received no notice of the trust which affected the property."[17] He must show that he had no notice actual, constructive or imputed.

Actual notice is the simple case where the purchaser subjectively knew of the equitable interest.

Constructive notice exists where knowledge of the equitable interest would have come to him if he had made all such inquiries as a prudent purchaser would have made.

Imputed notice covers actual or constructive notice to his agent who was acting as such in the transaction in question.[18]

ii. Duty to Make Inquiries. As we have seen, a purchaser will be held to have constructive notice of such equitable interests as would have come to his notice if he had made such inquiries as a reasonable and prudent purchaser would make. The inquiries which should be made will depend on the type of property in question. A purchaser, however, should always inspect the premises. The rule before 1926, and still sometimes applicable, is that a purchaser has notice of the interest of a person in possession of the property.[19]

(*a*) *Purchase of Freeholds.* Unless the title is registered, a vendor satisfies a purchaser of his ownership of the land and of his entitlement to sell by producing his title deeds which trace the history of the ownership of the land. The title should start with a good root of title[20] at least thirty years old.[21] A prudent purchaser should examine that document and every one subsequent to it; he will normally be held to have constructive notice of every equitable interest which appears on the title[22]; but not of those disclosed by earlier deeds with which he is not concerned. If he agrees to accept a title which begins later than the statutory period of thirty years, he does so at his own risk, and will be bound by equitable interests disclosed by documents which are within the statutory period but prior to the agreed date.[23] It is said that he is *normally* deemed to

[17] *Per* Fry J. in *Re Morgan* (1881) 18 Ch.D. 93 at p. 102.
[18] L.P.A. 1925, s. 199.
[19] *Barnhart* v. *Greenshields* (1853) 9 Moo.P.C. 18; *Hunt* v. *Luck* [1902] 1 Ch. 428; Maitland, p. 122; L.R.A. 1925, s. 70 (1) (*g*); *Webb* v. *Pollmount* [1966] Ch. 584. As to the effect on this rule of the provisions of the 1925 legislation relating to the registration of land charges, see *post*, p. 25; *Hollington Bros.* v. *Rhodes* [1951] 2 All E.R. 578n.; *Smith* v. *Jones* [1954] 1 W.L.R. 1089.
[20] *i.e.*, "a document which describes the land sufficiently to identify it, which shows a disposition of the whole legal and equitable interest contracted to be sold, and which contains nothing to throw any doubt on the title"; M. & W., p. 586; Cheshire, p. 660.
[21] L.P.A. 1925, s. 44. See Law of Property Bill 1969, Cl. 21, providing that the period should be reduced to 15 years.
[22] *Carter* v. *Carter* (1857) 3 K. & J. 617. But see *Pilcher* v. *Rawlins*, *infra*.
[23] *Re Nisbet and Pott's Contract* [1906] 1 Ch. 386; affirming [1905] 1 Ch. 391.

have constructive notice of interests disclosed by the deeds. There is an exception where there are in fact deeds which disclose an equitable interest, but the vendor is able to produce an apparently perfect title after suppressing some of them. Thus in *Pilcher* v. *Rawlins*[24]:

> Rawlins was the fee simple owner of land. He conveyed it by way of mortgage to the trustees of Pilcher's settlement as security for a loan. Later the surviving trustee re-conveyed the land to Rawlins although the loan was not fully repaid. The legal estate was later conveyed by Rawlins to other mortgagees, Rawlins making title without disclosing the conveyance to the trustees of the Pilcher settlement and the re-conveyance to him.
>
> The beneficiaries under the settlement claimed that the new purchasers took subject to their equitable interests. The purchasers claimed to be purchasers of the legal estate for value without notice. There was no way in which the new purchasers could have found that the land had been conveyed to the trustees and become subject to the trusts, because Rawlins' title appeared to be perfect when he disclosed only the deeds by which the land was first conveyed to him. The beneficiaries argued that the trusts were in fact disclosed by the title; because the title in fact included the conveyance to Rawlins, that from him to the trustees and that back to Rawlins. The court had to decide what was the basic rule; whether it was that the purchaser could have discovered the existence of the trusts by making proper inquiries; or whether the fact that the trusts were disclosed on the title automatically gave the purchasers constructive notice. As we have seen, the court decided that the test was whether the purchasers had made all reasonable inquiries, and concluded that they had; they therefore took free of the trusts.

(*b*) *Leases.* A person intending to enter into a lease is not entitled to examine the title of the lessor (the freeholder).[25] In spite of this, it was held before 1926 that a lessee was bound by constructive notice of equitable interests which he would have discovered if he had examined it.[26] That rule was reversed in 1925.[27] The lessee is however bound by registered charges.[28]

[24] (1872) L.R. 7 Ch.App. 259.
[25] L.P.A. 1925, s. 44 (3).
[26] *Patman* v. *Harland* (1881) 17 Ch.D. 353.
[27] L.P.A. 1925, s. 44 (3); *Shears* v. *Wells* [1936] 1 All E.R. 832.
[28] *White* v. *Bijou Mansions* [1937] Ch. 610 at p. 619; (1940) 56 L.Q.R. 361 (D. W. Logan); (1956) C.L.J. 230–234 (H. W. R. Wade).

(*c*) *Personalty.* The doctrine of constructive notice applies differently with personalty. There is no duty on the purchaser to examine the seller's title; and usually there are no documents of title.[29] A purchaser of chattels need not search the register of bills of sale and will not be bound by entries on it.[30] The holder of a negotiable instrument may be a "holder in due course" without taking steps to inquire into the title of the transferor.[31] And a purchaser of shares is not required to inquire about beneficial ownership, nor may notice of any trust affecting the shares be entered on the company's register of shareholders. However, where some equitable interest or charge is disclosed to a purchaser of personalty or presents itself to his notice, he will be bound by it if it is not satisfied out of the purchase money.[32]

iii. Registration of Charges under the Land Charges Act 1925. The Land Charges Act of 1925 provides for the registration of various charges or obligations affecting land[33]; most of the registrable charges are equitable but some are legal. Registration pursuant to the Land Charges Act is deemed to be actual notice to all persons so long as the registration remains in force.[34] And land charges classes B, C, D and F are void against a purchaser[35] of the land unless registered.[36]

It will be seen that this enactment has vitally affected the old doctrines of notice. Where a charge is registrable, the old rules as to notice no longer apply. A purchaser is deemed to have notice of a charge if it is registered.[37] If it is not registered he takes free even if he actually knows about it[38]; or if the interest in question is that of a person who is in actual possession of the land.[39]

D. Over-Reaching

More important for our present purposes than the list of charges and obligations made registrable by the Land Charges Act 1925

[29] See Factors Act 1889, s. 1 (4). The registration book of a car is not a document of title: *Joblin* v. *Watkins and Roseveare (Motors) Ltd.* [1949] 1 All E.R. 47.

[30] *Joseph* v. *Lyons* (1884) 15 Q.B.D. 280; Tiley, p. 14.

[31] *London Joint Stock Bank* v. *Simmons* [1892] A.C. 201, 221; *Ellis* v. *Hinds* [1947] K.B. 475 at p. 483.

[32] *Nelson* v. *Larholt* [1948] 1 K.B. 339.

[33] L.C.A. 1925, s. 10.

[34] L.P.A. 1925, s. 198 (1). See, however, Law of Property Bill 1969, Cl. 23.

[35] In land law a purchaser is one who obtains an interest in land by any means other than by descent.

[36] L.C.A. 1925, s. 13 (2). In the case of land charges class D, and an estate contract entered into after January 1, 1926, the charge only becomes void in favour of a purchaser for money or money's worth. See also, as to class F, Matrimonial Homes Act 1967, s. 2 (5).

[37] L.P.A. 1925, s. 198.

[38] *Hollington Brothers* v. *Rhodes* [1951] 2 All E.R. 578n.

[39] *Smith* v. *Jones* [1954] 1 W.L.R. 1089.

are equitable beneficial interests generally: that is to say, the equitable interests enjoyed by beneficial owners of land under settlements or trusts for sale. Under the Law of Property Act 1925, s. 1 (1), the only legal estates which can exist in land after 1925 are the fee simple absolute in possession and the term of years absolute. Thus, in every case in which the beneficial ownership of land is split into successive interests other than leases, the interests are equitable.

The 1925 legislation also provides that all successive beneficial interests in land must be held either behind a trust for sale or under a settlement.[40] In the case of a trust for sale, the legal estate is vested in the trustees for sale, and is held by them on trust to sell and the beneficial interests are imposed upon the proceeds of sale or upon the rents and profits until sale.[41] They are not upon the land. The only trust upon the land is the trust to sell. Where therefore the trustees for sale sell the land in performance of their duty to sell, the land which the purchaser takes is unaffected by any trusts; the trusts are and always have been, imposed upon the purchase money.

The Law of Property Act, s. 2 (1) (ii), provides that the purchaser takes free from the beneficial interests. But this provision is not strictly necessary; the purchaser from trustees for sale took free of the beneficial interests before the Act. It should also be said that, in order to allow the trust for sale to be used as a convenient method of dealing with a family's land, the trustees are given by statute a discretion to postpone sale indefinitely.[42] The point however here is that this is a method of settling land by giving equitable interests to members of the family; without however the risk that the interests of those beneficiaries might be destroyed by a bona fide purchaser of the legal estate. There is no need therefore to provide for such beneficial interest to be registered.

A strict settlement within the Settled Land Act 1925 is, broadly speaking, another method of achieving the same result. Here the legal fee simple is vested in the tenant for life who holds it on trust for himself for life and then on trust for the other beneficiaries under the settlement. Every settlement of successive interests is a strict settlement unless the land is subject to a trust for sale.[43] The Settled Land Act 1925 provides that if the purchaser observes the provisions of the Act (including the payment of the purchase money to the

[40] S.L.A. 1925, s. 1.
[41] L.P.A. 1925, s. 2; *post*, p. 512. See the definition of "statutory trusts" in L.P.A. 1925, s. 35.
[42] L.P.A. 1925, s. 25.
[43] S.L.A. 1925, s. 1 (7).

trustees and not to the tenant for life), the beneficial interests under the settlement shall be taken from the land and transferred to the purchase money.[44] Thus the purchaser takes the land free from the beneficial interests; which is what he wants. The beneficiaries have interests in the purchase money which are equivalent to those which they previously had in the land. And there is no problem of a bona fide purchaser destroying the interests of the beneficiaries. This process of transfer from the land to the purchase money is called "over-reaching." In the case of strict settlement, this over-reaching could be effected by express provision in the settlement, and is now statutory. In the case of trust for sale, it was, as we have seen, automatic. In neither case therefore is there any need to register the beneficial interests.

The old rules of notice therefore apply under the 1925 system only in the cases of equitable interests and charges which are neither registrable nor over-reachable. Such a situation rarely arises. The problem is met particularly in the context of licences and of equitable easements.[45] The question of the extent to which a deserted wife should be protected against a purchaser of the matrimonial home gave rise to much difficulty and litigation; and is now governed by the Matrimonial Homes Act 1967 which gives to a spouse, who has no beneficial interest in the matrimonial home, certain rights of occupation, and protects those rights by registration under a new category of land charge, or, in the case of registered land, by notice or caution.[46]

E. Purchase with Notice from Purchaser without Notice

A purchaser of a legal estate for value without notice, taking a good title, free, as we have seen, from the equitable interests, may pass his good title to a purchaser who *has* notice. Otherwise, if the equitable claims became publicly known, the property would become unsaleable. The limits of this rule were expressed in *Wilkes* v. *Spooner*[47] where

> X, the lessee of two High Street shops, Nos. 137 and 170, assigned the lease of No. 170 to the plaintiff, and covenanted, in effect, not to compete with the plaintiff's business as a general butcher. This restriction upon the user of No. 137

[44] S.L.A. 1925, ss. 18, 72, 75.
[45] *Post*, p. 690; *Poster* v. *Slough Estates Ltd.* [1968] 1 W.L.R. 1515; and also, apparently, where a wife has contributed towards the purchase money of a house the legal title to which is in the husband: *Caunce* v. *Caunce* [1969] 1 W.L.R. 286.
[46] Matrimonial Homes Act 1967, s. 2 (6); Class F.
[47] [1911] 2 K.B. 473.

premises was such as to be binding in equity on the land under the doctrine of *Tulk* v. *Moxhay*.[48]

X surrendered the lease of No. 137 for value to the landlord, who, not knowing of the restrictive covenant, accepted the surrender; and then granted a new lease to X's son, who did know of it.

The Court of Appeal held that the covenant was not binding. The landlord was a purchaser for value without notice. The covenant was destroyed, and did not revive on the passing of the land to the son. They approved a quotation from Ashburner[49]: "A purchaser for valuable consideration without notice can give a good title to a purchaser from him with notice. The only exception is that a trustee who has sold property in breach of trust, or a person who has acquired property by fraud cannot protect himself by purchasing it from a bona fide purchaser for value without notice."[50]

6. The Subject-Matter of Equity

In this Introduction, it has only been possible to mention certain heads of equitable jurisdiction as they became relevant, and it may be helpful to the understanding of equity to list the subjects which should properly be included within it. No list can be exhaustive. Certain matters however were assigned to the Chancery Division by the Judicature Act 1873, s. 34. These are additional to any causes or matters in respect of which exclusive jurisdiction was under any other Act given to the Court of Chancery or to any judge thereof. They are:

The administration of the estates of deceased persons;

The dissolution of partnerships, or the taking of partnership or other accounts;

The redemption or foreclosure of mortgages or a claim for the payment of moneys secured by a mortgage or for the delivery of possession of mortgaged property;

The raising of portions or other charges on land;

The sale and distribution of the proceeds of property subject to any lien or charge;

The execution of trusts, charitable or private;

[48] (1848) 2 Ph. 774; *post*, p. 600.

[49] Ashburner, *Principles of Equity* (2nd ed.), p. 55.

[50] *Bovey* v. *Smith* (1682) 1 Vern. 60; *Lowther* v. *Carlton* (1741) 2 Atk. 242; *Sweet* v. *Southcote* (1786) 2 Bro.C.C. 66; *Re Stapleford Colliery Co., Barrow's Case* (1880) 14 Ch.D. 432.

The rectification or setting aside, or cancellation of deeds or other written instruments;
The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases;
The partition or sale of real estates;
The wardship of infants and the care of infants' estates.

7. The Trust in Modern Law

The trust continues to be a form of property holding of ever-increasing importance because of its adaptability and convenience in effecting complicated forms of settlement. If a settlor wishes to give property to his wife for life and after her death to various other members of the family, it would be possible to arrange a system of law by which it could be done without using a trust. Indeed, the early common law did so, in an elementary form. And Roman law did so; as do those countries which have followed modernised systems of Roman law.

In England, full use has been made of the convenience of the system whereby the legal estate is in the trustees and the equitable or beneficial ownership is kept separate. We have seen that this is insisted upon for the creation of successive interests in land under the 1925 legislation.[51] The legal title can be kept clear of beneficial interests; the land can be sold free of them to a purchaser, who can over-reach them. Thus a most elaborate system of beneficial interests can be created without complicating the title to the land.

The same advantages exist with personalty. Most modern settlements deal wholly or partly with personalty in the form of investments. No system of legal future interests in personalty ever developed; for settlements of personalty did not arise until the system of trusts was well advanced. In this sphere also, it is most convenient to separate legal and equitable ownership; by doing so, the trustees can buy and sell shares without the purchaser being concerned with the beneficial interests.[52] The beneficial interests attach to whatever is held by the trustees for the time being.

Those are the simple cases. Settlors may wish to create other forms of settlement. With a gift for charitable purposes, for example, there is no beneficial owner; such a gift is effected by a special

[51] *Ante*, p. 26.

[52] No notice of any trust can be entered on the register of shareholders (Companies Act 1948, s. 117). The interests of a beneficiary can be protected by serving a notice on the company (known as a stop notice) requiring the company, on receiving a request to transfer the shares, to report this fact to the person giving the notice. Such person, if he wishes to take steps to prevent the transfer, must do so within eight days; R.S.C., Ord. 50, rr. 11–14.

form of trust.[53] A settlor may wish to protect a beneficiary from his own extravagance by making it impossible for creditors to proceed against his limited interest; this is done by a protective trust.[54] The settlor may wish to allow his trustees to determine from time to time how the capital and income shall be distributed among the beneficiaries; this is done by a discretionary trust.[55] Each sort of trust will be considered in its proper place. It will in each case be seen that the desired result could have been effected without the existence of a trust; but that the trust is a very satisfactory and convenient way of effecting it; and that this has become the only way in which it can now be effected in English law. Finally, it should never be forgotten that there is one factor which dominates all others in the context of the creation of trusts in modern law: taxation. The popular forms of trust today are those which reduce to a minimum the liability to tax or estate duty. And the Chancery lawyer's job in such cases is to be able to advise on these matters and to create the most appropriate trusts to meet the wishes of the settlor.[56]

[53] *Post*, p. 252 *et seq.*
[54] *Post*, p. 171 *et seq.*
[55] *Post*, p. 180 *et seq.*
[56] See generally Potter and Monroe; Morcom; Parker and Mellows, *Modern Law of Trusts*, pp. 98–100; Maudsley and Burn, pp. 130–141.

PART II

EQUITABLE REMEDIES

EQUITABLE REMEDIES

THE study of equitable remedies is the key to the understanding of equity. We have seen that the continued existence of equity jurisdiction was dependent upon the upholding by James I of the validity of common injunctions,[1] otherwise a plaintiff would have proceeded to judgment at law. Similarly uses could only be enforced by compelling the feoffee to uses to hold the property to the use of the beneficiary.[2] In the more developed state of equity, and once its jurisdiction was no longer challenged by common law, equitable rights develop in so far as, and to the extent that, they are enforceable by equity's peculiar remedies. The most significant of these are specific performance and injunction; there was no power until 1858 to award damages.[3]

A decree of specific performance is an order of the court ordering the defendant to carry out certain obligations. Conversely, an injunction is an order not to do something.[4] In each case, equity is acting *in personam,* and a refusal to comply with the order is a contempt of court and punishable by imprisonment.

It is obvious from the nature of these remedies that they will only be appropriate in certain types of situation. Further, the extremity of the sanction postulates caution in their exercise. It will be seen that the basic principles relating to specific performance and injunction are that (i) they are only available where common law remedies are inadequate; (ii) they are only given as a matter of discretion, and (iii) they will never issue unless the court can ensure that they will be observed.

[1] *Ante*, p. 11.
[2] Simpson, *An Introduction to the History of Land Law*, p. 166.
[3] Chancery Amendment Act 1858 (commonly called Lord Cairns' Act), *ante*, p. 13.
[4] *Post*, Chap. 3. A mandatory injunction however is in effect an order to take positive action to discontinue a wrong; *post*, p. 60.

CHAPTER 2

SPECIFIC PERFORMANCE

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1. SPECIFIC PERFORMANCE IS A REMEDY IN PERSONAM [1]

A DECREE of specific performance issues against the individual defendant. If the defendant is within the jurisdiction of the court and can be compelled personally to carry out his obligation, the court may order him to do so even though the subject-matter of the contract is outside the jurisdiction of the court.

In *Penn* v. *Lord Baltimore* [2] the plaintiffs and defendant had entered into a written agreement fixing the boundaries of Pennsylvania and Maryland, the former of which belonged to the plaintiffs and the latter to the defendant, under various grants which were recited in the agreements. The plaintiffs sued the defendant

[1] *Ante*, pp. 15, 33.
[2] (1750) 1 Ves.Sen. 444; *Richard West and Partners (Inverness) Ltd.* v. *Dick* [1969] 2 W.L.R. 383, affirmed [1969] 2 W.L.R. 1190.

in the Court of Chancery in England to have the agreement specifically performed, and one of the objections taken by the defendant was to the jurisdiction of the court. This objection was overruled by Lord Hardwicke on the ground that "the conscience of the party was bound by this agreement; and being within the jurisdiction of this court, which acts *in personam,* the court may properly decree it as an agreement." [2a] He reasoned that though the land was not within the jurisdiction, the defendant was, and the court would hold him in contempt unless he complied.

But this jurisdiction is not, perhaps, so wide as might at first appear. The land in question was subject at that time to the Crown. The court was invited in *Re Hawthorne* [3] to apply it to land in Saxony (not subject to the Crown) but refused to do so. It appears that the tendency of modern decisions is to restrict rather than to enlarge the limits within which this jurisdiction will be exercised.[4]

2. Specific Performance is a Discretionary Remedy

We will see that there are some situations in which it is settled that the plaintiff may expect to obtain specific performance [5]; a normal case is that of a contract to create or convey a legal estate in land [6] (for example, to sell land or to grant a lease). It cannot however be said that a plaintiff in such circumstances is *entitled* to a decree; because the issue of a decree is always subject to the discretion of the court. On the other hand, there are, as will be seen,[7] situations in which it can firmly be said that the plaintiff will *not* be awarded specific performance. It is perhaps for this reason that most of the books list the conditions for the award of specific performance in the negative—and state the circumstances in which a decree will not be granted.[8]

On the more positive side, it can be said that specific performance *will* be granted of a contract to create or convey a legal estate in land unless some special consideration arises to prevent it; and *may* be granted of a contract to sell specific or ascertained goods or

[2a] *Ibid.* at p. 447.
[3] (1883) 23 Ch.D. 743.
[4] See *per* Parker J. in *Deschamps* v. *Miller* [1908] 1 Ch. 856 at p. 863; Dicey and Morris, *Conflict of Laws* (8th ed.), p. 147 *et seq.*
[5] See *Goring* v. *Nash* (1744) 3 Atk. 186; *White* v. *Damon* (1802) 7 Ves.Jr. 30; *Haywood* v. *Cope* (1858) 25 Beav. 140, *per* Romilly M.R. at p. 151; *Lamare* v. *Dixon* (1873) L.R. 6 H.L. 414.
[6] *Post*, p. 500.
[7] *Post*, p. 44 *et seq.*
[8] Fry, *Specific Performance* (6th ed.), Part III; Snell, p. 644; Pettit, *Equity and the Law of Trusts*, p. 366.

other personal property of unusual rarity or distinction.[9] Apart from these situations, successful claims to specific performance are most uncommon.[10]

The discretionary nature of the remedy may work in favour of its exercise.

> In *Hasham* v. *Zenab* [11] a decree to complete was granted before the date fixed for completion of a contract for sale of land. The defendant had been guilty of anticipatory breach by tearing up the contract, almost as soon as she had signed it, on the ground that she had never intended to sell so large a plot. The decree would not, of course, take effect before the fixed date.

Usually, however, it works the other way. The circumstances in which specific performance may be refused in the court's discretion are infinite and various. A few only of the most common types of situation can be considered here.

A. Mistake and Misrepresentation

There are situations in which equity, although refusing to rescind a contract or cancel a deed for mistake or misrepresentation, will decline to allow the other party positive equitable help in enforcing it. The plaintiff will be left to his remedy in damages.[12] The court is not bound to decree specific performance in every case in which it will not set aside the contract, nor to set aside every contract that it will not specifically enforce.[13]

A defendant cannot resist specific performance by alleging merely his own fault and mistake [14]; nor on the ground that he was mistaken as to the legal effect of the agreement.[15] Generally, equity will hold the defendant to enforcement of his bargain unless it can be shown that this would involve real hardship amounting to injustice.[16]

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9 *Post*, p. 38.

10 See however the exceptional case of certain building contracts; *Wolverhampton Corporation* v. *Emmons* [1901] 1 K.B. 515; *Carpenters Estates* v. *Davies* [1940] Ch. 160; Tiley, p. 90; *post*, p. 45; and the case of certain money payments; *post*, pp. 40, 55.

11 [1960] A.C. 316; (1960) 76 L.Q.R. 200 (R. E. M.).

12 See *per* Lord Eldon in *Mortlock* v. *Buller* (1804) 10 Ves.Jr. 292.

13 *e.g.*, *Wood* v. *Scarth* (1855) 2 K. & J. 33 (at equity); 1 F. & F. 293 (at law).

14 *Duke of Beaufort* v. *Neeld* (1845) 12 Cl. & F. 248 at p. 286; *Monro* v. *Taylor* (1851) 3 Mac. & G. 713; *Swaisland* v. *Dearsley* (1861) 29 Beav. 430.

15 *Powell* v. *Smith* (1872) L.R. 14 Eq. 85; *Hart* v. *Hart* (1881) 18 Ch.D. 670.

16 *Tamplin* v. *James* (1880) 15 Ch.D. 215; *Van Praagh* v. *Everidge* [1902] 2 Ch. 266; reversed on another ground [1903] 1 Ch. 434.

In *Webster* v. *Cecil*[17] A, by letter, offered to sell some property to B. He intended to offer it at £2,250 but by mistake wrote £1,250. B agreed to buy at £1,250. A immediately gave notice of the error and was not compelled to carry out the sale.

In *Tamplin* v. *James*[18] an inn was offered for sale, and was correctly described with reference to plans. At the rear of the inn was a piece of land, not belonging to the vendors, and so not included in the sale, which had commonly been occupied with the inn. The defendant knew the premises, but did not consult the plans, and he agreed to purchase in the belief that he was buying both the inn and the land at the rear. Specific performance was ordered against him.

A case that goes further is *Malins* v. *Freeman*,[19] where an estate was purchased at an auction and the defendant bid under a mistake as to the lot put up for sale. Specific performance was refused although the mistake was due entirely to the defendant's fault and not in any way caused by the vendor; and the defendant waited until the auction was over before declaring the mistake.

B. Plaintiff in Breach of his own Obligation

A plaintiff must come to equity with clean hands. Before specific performance can be decreed in his favour, he must show that he has performed all his own obligations under the contract,[20] or has tendered performance, or is ready and willing to perform them.[21] Thus a person holding under an agreement for a lease is not entitled to a decree of specific performance of the lease if he is himself in breach of one of its covenants.[22]

C. Laches or Delay

Generally, in equity, time is not held to be of the essence of a contract,[23] and specific performance may be decreed although the time for performance has passed. A plaintiff who delays unreasonably in bringing an action for specific performance may lose his claim.[24]

[17] (1861) 30 Beav. 62; *Joynes* v. *Statham* (1746) 3 Atk. 388; *Day* v. *Wells* (1861) 30 Beav. 220; *cf. Hartog* v. *Colin and Shields* [1939] 3 All E.R. 566.
[18] (1880) 15 Ch.D. 215; Tiley, p. 42.
[19] (1837) 2 Keen 25.
[20] Except the most trivial ones; *Dyster* v. *Randall* [1926] Ch. 932 at pp. 942–943.
[21] *Lamare* v. *Dixon* (1873) L.R. 6 H.L. 414; *Australian Hardwoods Pty. Ltd.* v. *Railways Commissioner* [1961] 1 W.L.R. 425; Tiley, p. 81.
[22] *Walsh* v. *Lonsdale* (1882) 21 Ch.D. 9; Tiley, p. 12; *Coatsworth* v. *Johnson* (1886) 55 L.J.Q.B. 220; *Swain* v. *Ayres* (1888) 21 Q.B.D. 289.
[23] This rule now applies also at law; L.P.A. 1925, s. 41.
[24] *Southcomb* v. *Bishop of Exeter* (1847) 6 H. 213; *Eads* v. *Williams* (1854) 4 De G.M. & G. 674; *Lord James Stuart* v. *L.N.W. Ry.* (1852) 1 De G.M. &. G. 721.

D. Hardship

In general, specific performance may be refused in the discretion of the court where a decree would cause unnecessary hardship to either of the parties.[25] Inadequacy of price is not, standing by itself, a ground for refusing specific performance; but it may be evidence of other factors, such as fraud [26] or undue influence,[27] which would render enforcement inequitable.

3. The Remedy of Damages must, in the Circumstances, be Inadequate

It is a fundamental rule that specific performance will not be granted where the plaintiff would be adequately compensated by the common law remedy of damages.[28]

A. Sales of Land or Unique Chattels

Each piece of land is unique; and it is accepted as a general rule that an award of damages is not adequate compensation for the defendant's refusal to complete a sale or a lease. We have seen that this is the normal type of situation for the issue of a decree of specific performance [29]; and that the vendor or lessor may also have specific performance in such circumstances. On the other hand, chattels and stocks and shares do not usually possess such individual character. Most commercial contracts for the purchase of goods,[30] or for a loan of money,[31] or contracts for the purchase of government stock, will not be specifically performed.[32] But if stock or shares cannot always be bought in the market, the court may order specific performance [33]; or where a chattel has especial value by reason of its

[25] *Denne* v. *Light* (1857) 8 De G.M. & G. 774; *Pegler* v. *White* (1864) 33 Beav. 403; *Tamplin* v. *James* (1880) 15 Ch.D. 215; for further details see Fry, *Specific Performance*, Chap. 16.

[26] *Coles* v. *Trecothick* (1804) 9 Ves.Jr. 234 at p. 246; *Callaghan* v. *Callaghan* (1841) 8 Cl. & F. 374.

[27] *Fry* v. *Lane* (1888) 40 Ch.D. 312 (sale set aside).

[28] *Hutton* v. *Watling* [1948] Ch. 26 at p. 36, affirmed [1948] Ch. 398. The approach of equity differs, as Lee has pointed out (*Introduction to Roman-Dutch Law* (5th ed.), Appendix I), from that of Roman-Dutch law, under which specific performance is usually granted, subject only to the overriding discretion of the court to refuse the remedy in the interests of justice in the particular case; *Abdeen* v. *Thaheer* [1958] A.C. 116.

[29] *Ante*, p. 35.

[30] *Dominion Coal Co. Ltd.* v. *Dominion Iron and Steel Co. Ltd.* [1909] A.C. 293; *Cohen* v. *Roche* [1927] 1 K.B. 169.

[31] *South African Territories Ltd.* v. *Wallington* [1898] A.C. 309; see *Beswick* v. *Beswick* [1968] A.C. 58, *post*, p. 55.

[32] *Cud* (*or Cuddee*) v. *Rutter* (1720) 1 P.Wms. 570 (South Sea Bubble Stock); *Mason* v. *Armitage* (1806) 13 Ves.Jr. 25.

[33] *Duncuft* v. *Albrecht* (1841) 12 Sim. 189; Tiley, p. 98; (1953) 51 Mich.L.R. 408 (A. Neef).

individuality, beauty or rarity [34]; indeed in such situations there is an ancient jurisdiction to order the specific recovery of such a chattel if wrongly detained.[35]

B. Specific or Ascertained Goods

Further, section 52 of the Sale of Goods Act 1893 enables the court to decree specific performance of a contract for the sale of specific [36] or ascertained [37] goods, either unconditionally, or upon such terms as to damages, payment of the price or otherwise as to the court may seem just. The power is of course a discretionary one. It was intended to broaden the scope of the remedy of specific performance in connection with the purchase of chattels, but less use has been made of it than might have been expected.[38]

> In *Cohen* v. *Roche*,[39] the plaintiff agreed to purchase from the defendants a set of eight Hepplewhite chairs. This was a contract for the sale of specific goods; but McCardie J., finding that the chairs were "ordinary articles of commerce and of no special value or interest," refused to order specific performance and awarded damages.
>
> In *Behnke* v. *Bede Shipping Co.*,[40] Wright J. made an order for specific performance of a contract for the sale of a ship, being satisfied that the ship was of "peculiar and practically unique value to the plaintiff."

C. Vendor or Lessor

In a situation where specific performance would be decreed in favour of a party who is claiming the transfer of property to him the court, treating each party equally, will give specific performance to the other party; for example, specific performance will be given in favour of a vendor or lessor,[41] although a monetary payment would in most circumstances be adequate compensation.[42]

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[34] *Falcke* v. *Gray* (1859) 4 Dr. 651; *Thorn* v. *Commissioners of Public Works* (1863) 32 Beav. 490; *Phillips* v. *Lamdin* [1949] 2 K.B. 33.

[35] *Pusey* v. *Pusey* (1684) 1 Vern. 273 (an antique horn, supposedly given by King Canute); *Duke of Somerset* v. *Cookson* (1735) 3 P.Wms. 390 (an altar piece); *Fells* v. *Reed* (1796) 3 Ves.Jr. 70; Tiley, p. 100; (the tobacco box of a club).

[36] Defined in Sale of Goods Act 1893, s. 62, to mean "identified and agreed upon at the time a contract of sale is made."

[37] See *Re Wait* [1927] 1 Ch. 606 at p. 630, where "ascertained," which is not defined in the Act, was said "probably" to mean "identified in accordance with the agreement after the time a contract of sale is made." *Fothergill* v. *Rowland* (1873) L.R. 17 Eq. 132; Tiley, p. 112; (the "get" of coal in a colliery for five years held not to be within the section).

[38] Treitel, *Law of Contract* (2nd ed.), p. 689; [1969] J.B.L. 211.

[39] [1927] 1 K.B. 169.

[40] [1927] 1 K.B. 649, 661; *cf. Hart* v. *Herwig* (1873) L.R. 8 Ch.App. 860.

[41] *Walsh* v. *Lonsdale* (1882) 21 Ch.D. 9; Tiley, p. 12.

[42] *Cogent* v. *Gibson* (1864) 33 Beav. 557.

D. Contracts to Pay Money

Apart from the situations discussed in C above, specific performance is not available to compel the payment of money. It is possible however that the House of Lords' decision in *Beswick* v. *Beswick* [43] may initiate a new approach to the question.

4. The Contract Must be Enforceable in Equity

A. The Doctrine of Part Performance

Section 40 of the Law of Property Act 1925 [44] provides:

> (1) No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised.
>
> (2) This section applies to contracts whether made before or after the commencement of this Act and does not affect the law relating to part performance, or sales by the court.

The equitable doctrine of part performance is one whereby equity will in certain circumstances enforce a contract although the plaintiff is not able to provide the written evidence required by the statute.[45] The circumstances, all of which must co-exist, are as follows [46]:

i. Acts Referable to a Contract. The acts of part performance need to be "such as *must* be referred to some contract,[47] and *may* be referred to the alleged one; . . . they [must] prove the existence of some contract and [be] consistent with the contract alleged." [48]

It was sometimes thought that this requirement was more stringent and that the acts must be unequivocally referable to the contract, *i.e.*, that they refer to the contract alleged, and could not refer to

[43] [1968] A.C. 58, *post*, p. 55.

[44] Re-enacting Statute of Frauds 1677, s. 4.

[45] An important application of the doctrine is the creation of an equitable mortgage by deposit of title deeds, *post*, p. 539; *Russel* v. *Russel* (1783) 1 Bro.C.C. 269.

[46] Based on Fry's *Specific Performance* (6th ed.) but amended to comply with *Kingswood Estate Co. Ltd.* v. *Anderson* [1963] 2 Q.B. 169; *Wakeham* v. *Mackenzie* [1968] 1 W.L.R. 1175; (1968) 32 Conv.(N.S.) 384 (P. H. Pettit).

[47] "The expression 'must be referred to some contract' used by Upjohn L.J. in the *Kingswood Estate* case, cannot exclude any act which could possibly be referable to love and affection, for wherever a man goes into possession of land, he may be there by the grace and favour of another," *per* Stamp J. in *Wakeham* v. *Mackenzie* (*supra*), at p. 1181.

[48] Fry, *op. cit.* at p. 278 (italics supplied).

any other situation.[49] Such a rule would require that the acts were such as, by their own force, " to show the very same contract as the plaintiff alleged." [50] The correct principle however seems to be that above stated.

In *Maddison* v. *Alderson*,[51] the appellant had served an employer for many years as a housekeeper, some of her wages being in arrears. In 1860 she informed him that she contemplated leaving him as she had prospects of marriage. She was induced to stay in his service, without further payment of wages, on his oral promise to leave to her a life estate in the farm where they lived. He made a will to this effect, but it was unattested, and he died intestate. The question was whether her continuance in his service was a sufficient act of part performance to entitle her to enforce the oral contract. The House of Lords answered this in the negative. " Her mere continuance in Thomas Alderson's service, though without any actual payment of wages, was not such an act as to be in itself evidence of a new contract, much less of a contract concerning her master's land. It was explicable, without supposing any such new contract, as easily as the continuance of a tenant in possession after the expiration of a lease." [52]

Recently Stamp J. reached a contrary conclusion on facts which make an interesting comparison.

In *Wakeham* v. *Mackenzie*,[53] a widower aged 72 orally agreed with the plaintiff that, if she would move into his house and look after him for the rest of his life, paying her own board and coal, he would leave the house and contents to her. The plaintiff gave up her council flat, moved into the house, and observed her part of the agreement until the widower's death, but nothing was left to her in the will. It was held that specific performance must be granted. The plaintiff's acts were clearly referable to some contract, and were consistent with the contract alleged.

ii. Fraud in the Defendant. The Acts must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing.

[49] Fry, *op. cit.*, at p. 276; *Maddison* v. *Alderson* (1883) 8 App.Cas. 467; *Chaproniere* v. *Lambert* [1917] 2 Ch. 356.
[50] Fry, *op. cit.* at p. 277; *Lindsay* v. *Lynch* (1804) 2 Sch. & Lef. 1 at p. 8 *per* Lord Redesdale; *Chaproniere* v. *Lambert* (*supra*) at p. 361 *per* Warrington L.J.
[51] (1883) 8 App.Cas. 467.
[52] *Ibid.* at pp. 480–481 *per* Lord Selborne.
[53] [1968] 1 W.L.R. 1175.

Equity cannot of course disregard a statute wherever the provisions will reach an unjust result; and it is important to understand that the doctrine of part performance makes no claim to do so. The theoretical basis of the doctrine is, in the words of Lord Selborne in *Maddison* v. *Alderson*,[54] that "the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself."

The equities arise where the acts of part performance have been done by the party asserting the contract with the knowledge of the other party that the acts are being done on the faith of the contract; and the acts must be, as between the parties, "such a part execution as to change their relative positions as to the subject-matter of the contract."[55]

It is for this reason that a money payment, whether as rent or as purchase money, is not a sufficient act of part performance.[56] Acts of part performance commonly involve the taking possession of land; but taking possession is not of itself sufficient,[57] for it may be otherwise explained; nor, as we have seen, is it essential.[58]

In *Rawlinson* v. *Ames*[59] the plaintiff claimed specific performance of an agreement by the defendant to take a lease of the plaintiff's flat. The plaintiff had undertaken to carry out, and did carry out certain alterations to the flat. While the work was progressing, the defendant frequently visited the flat and made suggestions for further alterations which were carried out at his request. She then repudiated the contract. The acts of the plaintiff, carried out at the defendant's request, were sufficient acts of part performance, and specific performance was decreed.

iii. Enforceable by the Court. The contract to which the acts refer must be such as in its own nature is enforceable by the court.[60]

We have seen that it is only certain kinds of contracts which will be specifically enforced. Generally speaking, the doctrine of

54 (1883) 8 App.Cas. 467 at p. 475.
55 *Per* Lord Selborne in *Maddison* v. *Alderson* (1883) 8 App.Cas. 467 at p. 478; *per* Swinfen Eady J. in *Chaproniere* v. *Lambert* [1917] 2 Ch. 356 at p. 359.
56 *Thursby* v. *Eccles* (1900) 49 W.R. 281; *Chaproniere* v. *Lambert* [1917] 2 Ch. 356; Fry, *op. cit.* at p. 290.
57 *Delaney* v. *Smith* [1946] K.B. 393.
58 *Rawlinson v. Ames* [1925] Ch. 96; *Wakeham v. Markenzie* [1968] 1 W.L.R. 1175.
59 [1925] Ch. 96; *Dickinson* v. *Barrow* [1904] 2 Ch. 339.
60 *Per* Kay J. in *McManus* v. *Cooke* (1887) 35 Ch.D. 681 at p. 697, saying that the doctrine "applies to all cases in which a Court of Equity would entertain a suit for specific performance if the alleged contract had been in writing." Criticised by Fry, *op. cit.* at p. 283.

part performance is concerned only with such cases.[61] For the doctrine is an equitable one; its operation does not make the contract enforceable at law. The plaintiff cannot therefore recover damages, except where a court of equity will award damages in lieu of specific performance.[62]

iv. Proper Parol Evidence. There must be proper parol evidence of the contract which is let in by the acts of part performance.

It has been seen that the acts of part performance must establish the existence of a contract, but need not show its terms. The acts of part performance allow oral evidence to be introduced for this purpose, in spite of Law of Property Act 1925, s. 40, ". . . if there is evidence of such part performance, that is sufficient to warrant the admission of oral evidence to prove what the exact terms of the contract were."[63]

Thus, in *Kingswood Estate Co. Ltd.* v. *Anderson*,[64] an elderly widow who resided with her invalid son, in rent-controlled premises, accepted alternative accommodation provided by the plaintiffs who purchased her previous home. There was no written evidence of the terms on which she occupied the alternative accommodation. The plaintiffs claimed that she was a weekly tenant only. The widow claimed (*inter alia*) that she was entitled to remain there for the lives of herself and her son. The Court of Appeal held that her act of leaving the controlled premises and moving into the new accommodation was sufficient part performance. The terms of the agreement however had to be ascertained by oral evidence which established an agreement to allow her to remain there for the joint lives of herself and her son.

B. Fraudulent Prevention of Written Evidence

Even though there are insufficient acts of part performance, specific performance may be decreed of an oral agreement where

[61] To avoid a common misapprehension it might be mentioned that this statement does not involve any necessary connection between the doctrine of part performance and the remedy of specific performance. In a large majority of suits for a decree of specific performance, the plaintiff relies on written evidence of the contract, and not on acts of part performance. In that situation, he has a choice of remedies—damages or (subject to the court's discretion) specific performance. Thus, specific performance is available apart from part performance; but if the plaintiff relies on part performance, his remedy is specific performance.

[62] *Re Northumberland Avenue Hotel Co.* (1886) 33 Ch.D. 16 at p. 18; *Lavery* v. *Pursell* (1888) 39 Ch.D. 508.

[63] *Per* Willmer L.J. in *Kingswood Estate Co. Ltd.* v. *Anderson* [1963] 2 Q.B. 169 at p. 181.

[64] [1963] 2 Q.B. 169.

the defendant fraudulently prevented the production of written evidence. "(I)f there was any agreement for reducing the (agreement) into writing, and that is prevented by the fraud and practice of the other party, (then) this court will in such case give relief; as where instructions are given, and preparations made for the drawing of a marriage settlement, and before the completing of it, the woman is drawn, by the assurances and promises of the man, to perform it, and after to marry him."[65]

It was suggested that, if it had been necessary, this doctrine might have applied in *Wakeham* v. *Mackenzie*[66]; for the widower had in that case promised and assured the plaintiff that the oral agreement between him and the housekeeper had been put into proper legal form.[67]

5. Equity Will not Assist a Volunteer[68]

Specific performance will not be awarded to a party who has given no consideration. Unless the contract in question was under seal, consideration would indeed be necessary if the contract itself is to be valid. Parties to a contract under seal may sue at law, even though there is no consideration, but they will not be able to obtain specific performance.[69] Problems commonly arise in this connection in relation to covenants to make family settlements.[70]

There may be an exception to this rule in situations where a plaintiff is in possession of land as a volunteer in circumstances in which it would be unjust to deprive him of the legal estate. The question is discussed below.[71]

6. Specific Performance Will not be Ordered of Acts which Require the Supervision of the Court

It is settled law that a court will not order specific performance where the decree would require constant supervision by the court.

In *Ryan* v. *Mutual Tontine Westminster Chambers Association,*[72] a lease of a flat in a block of flats contained an agreement by the lessors to keep a resident porter, who should be in

65 *Maxwell* v. *Lady Montacute* (1719) Pre.Ch. 526.
66 [1968] 1 W.L.R. 1175, at p. 1182.
67 *Ibid.* at p. 1177.
68 *Post*, p. 133.
69 See *Cannon* v. *Hartley* [1949] Ch. 213.
70 *Post*, p. 140 *et seq.*,
71 *Post*, pp. 154, 681.
72 [1893] 1 Ch. 116; Tiley, p. 88; *Heathcote* v. *North Staffordshire Rail Co.* (1850) 2 Mac. & G. 100; *Blackett* v. *Bates* (1865) L.R. 1 Ch.App. 117 (maintenance of

constant attendance and perform certain specified duties. They appointed a person who got his work done by deputies, and absented himself for hours at a time acting as chef at a neighbouring club. It was held that the court could not order specific performance of such an agreement against the lessor at the request of the lessee.

The reason for this rule is that supervision would be impracticable. Equity does nothing in vain; and will not issue decrees which it cannot be certain to enforce. Of course, the issue of a decree supported by a threat of imprisonment would be effective in many cases; but imprisonment of the defendant for contempt, if he proves recalcitrant, will not get the duty performed. Equity's view is that of a wise parent dealing with his children; it is best not to issue orders unless you can be absolutely sure of effecting compliance.

Decrees for the specific performance of contracts to grant or convey a legal estate in land do not meet this difficulty. All that the defendant needs to do to perform such a contract is to seal the document. Ordinarily, on the issue of the decree, he will do so; if he refuses, he may be threatened with imprisonment for contempt; and if he still refuses, the court may nominate any person to effect the conveyance [73]; it can therefore be certain that the decree will be effective.

Thus the court does not, as a rule, order specific performance of a contract to build or repair [74]; but there are certain exceptional cases. "The first [requirement] is that the building work, of which he seeks to enforce the performance, is defined by the contract; that is to say, that the particulars of the work are so far definitely ascertained that the court can sufficiently see what is the exact nature of the work of which it is asked to order the performance. The second is that the plaintiff has a substantial interest in having the contract performed, which is of such a nature that he cannot adequately be compensated for breach of the contract by damages. The third is that the defendant has by the contract obtained possession of land on which the work is contracted to be done." [75]

railway); *Phipps* v. *Jackson* (1887) 3 T.L.R. 387; *Barnes* v. *City of London Real Property Co.* [1918] 2 Ch. 18; *Joseph* v. *National Magazine Co.* [1959] Ch. 14 (contract to publish an article not yet in final form).

[73] Supreme Court of Judicature (Consolidation) Act 1925, s. 47; Trustee Act 1925, s. 50; A.E.A. 1925, s. 43 (2). If a trustee has wilfully refused or neglected to convey the land for 28 days after being required to do so, the court may make a vesting order. T.A. 1925, s. 44 (vi); this, where available, is cheaper and more expeditious.

[74] *Wheatley* v. *Westminster Brymbo Coal Co.* (1869) L.R. 9 Eq. 538; *Haywood* v. *Brunswick Building Society* (1881) 8 Q.B.D. 403.

[75] *Wolverhampton Corporation* v. *Emmons* [1901] 1 K.B. 515 at p. 525, *per* Romer L.J.

In *Wolverhampton Corporation* v. *Emmons*,[76] a plot of land had been sold by the plaintiffs, an urban sanitary authority, in pursuance of a scheme of street improvement, to the defendant, who agreed to erect buildings thereon, and went into possession. A later agreement provided for the erection of the buildings in accordance with detailed plans. The Court of Appeal made a decree of specific performance.

This exception is said to be based on a "balance of convenience." Historically it originates in a series of cases relating to the early days of railways.[77] Where a railway was built through a farmer's land and the railway company undertook to provide a bridge or tunnel to connect the separated parts of the farmer's land, it would have been most unjust to leave the farmer to a remedy in damages. These specialised cases have been given more general application, and the formulation in *Wolverhampton Corporation* v. *Emmons*[78] was further extended in *Carpenters Estates* v. *Davies*,[79] where Farwell J. held that it was sufficient that the defendant was in possession of the land, whether he came in by the contract or not. After all, the defendant's possession is the material factor; for the plaintiff cannot then enter to perform the construction or repair work himself.

7. No Specific Performance of Contracts for Personal Work and Services[80]

There are two main reasons why contracts which are personal in nature or which involve personal services will not be specifically enforced. First, because they would require constant supervision. A contract of employment is in practice impossible to enforce. A threat of imprisonment might have the desired effect; but, as explained above,[81] there is nothing further that can be done if the defendant proves recalcitrant, and that is a risk which courts of equity will not run. Secondly, it is contrary to public policy to compel one person to submit to the orders of another. "(T)he Courts," said Fry L.J., "are bound to be jealous, lest they should turn contracts of service into contracts of slavery."[82] Conversely, equity will not compel an

[76] [1901] 1 K.B. 515.
[77] *Per* Kay L.J. in *Ryan* v. *Mutual Tontine Westminster Chambers Association* [1893] 1 Ch. 116, 128.
[78] [1901] 1 K.B. 515.
[79] [1940] Ch. 160.
[80] Fry, *Specific Performance*, pp. 50–51; *Lumley* v. *Wagner* (1852) 1 De G.M. & G. 604, *post*, p. 70; *Page One Records Ltd.* v. *Britton* [1968] 1 W.L.R. 157.
[81] *Ante*, p. 45.
[82] *De Francesco* v. *Barnum* (1890) 45 Ch.D. 430. See also *Johnson* v. *Shrewsbury and Birmingham Rail Co.* (1853) 3 De G.M. & G. 914; *Bainbridge* v. *Smith* (1889) 41 Ch.D. 462, and see *post*, p. 71.

employer to keep a servant.[83] The proper and exclusive remedy for wrongful dismissal is an action for damages.

8. No Specific Performance of Part of a Contract[84]

A court will not usually decree specific performance of any part of a contract unless it can decree performance of the whole.

In *Ogden* v. *Fossick*,[85] an agreement between the parties provided that the defendant would grant to the plaintiff a lease of a coal wharf, and that the defendant should be appointed manager of the wharf. In a suit for specific performance of the agreement to grant the lease, specific performance was denied on the ground that the part of the agreement which the court could enforce was inseparably connected with the contract of employment which it would not.

It may however be possible to construe a contract which contains several parts as being in effect several separate and distinct contracts, so that the enforcement of one part is independent of the others.[86] This question often arises where several lots of land are sold and the question is whether there is one sale of several lots,[87] or several sales of individual lots.[88]

9. Mutuality

A. Refusal of Specific Performance for Lack of Mutuality

It has been seen that where equity will decree specific performance in favour of a purchaser or lessee, the remedy will be available also in favour of the vendor or lessor.[89] Such a person can compel the other party to take the property or to accept a lease even though in many cases an award of damages would be adequate compensation for his loss. He can obtain specific performance under a principle of mutuality.

A similar principle applies to deny specific performance, on grounds of lack of mutuality, where the situation is one in which that remedy could not be available to the other party. One party is not compelled specifically to perform his obligation if he would

[83] *Page One Records Ltd.* v. *Britton* [1968] 1 W.L.R. 157.
[84] Fry, *op. cit.*, Chap. 16.
[85] (1862) 4 De G.F. & J. 426; *South Wales Rail Co.* v. *Wythes* (1854) 5 De G.M. & G. 880; *Brett* v. *East India and London Shipping Co. Ltd.* (1864) 2 Hem. & M. 404.
[86] *Wilkinson* v. *Clements* (1872) L.R. 8 Ch.App. 96, *post*, p. 49.
[87] *Roffey* v. *Shallcross* (1819) 4 Madd. 227.
[88] *Lewin* v. *Guest* (1826) 1 Russ. 325.
[89] *Ante*, p. 39.

himself be left with only a remedy in damages. In *Flight* v. *Bolland*,[90] an infant failed to obtain a decree of specific performance because a suit for specific performance could not be maintained against him.[91] Nor can a person whose own obligation is to perform personal services obtain a decree, for no decree could be obtained against him[92]; nor a vendor if he is himself unable to produce a good title.[93] "It is not disputed," said Leach M.R., "that it is a general principle of courts of equity to interpose only where the remedy is mutual."[94]

B. Criticisms of Fry's Rule

Fry accepts the rule that a contract must be mutual "that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them."[95] He admits a number of exceptions. But his critics[96] have pointed out that the exceptions are so numerous and so weighty as to destroy the proposition.

We have seen that *Flight* v. *Bolland*[97] decided that an infant cannot obtain specific performance because he would not himself be liable to a decree; but it had been held in *Clayton* v. *Ashdown*[98] that if an infant commences his action after attaining his majority he is entitled to succeed, even though he would himself continue to have a defence for a reasonable time after his majority.

Again, where there is a written memorandum of a contract concerning an interest in land, and it has been signed by the defendant but not by the plaintiff, the plaintiff may enforce it although the defendant could not have enforced it against him. It was said by Leach M.R. in *Flight* v. *Bolland*,[97] that the plaintiff "by the act of filing the bill, has made the remedy mutual."[99] And presumably a plaintiff who contracted as an infant and sued after majority would, by his action, render himself also liable.[1]

90 (1828) 4 Russ. 298; Tiley, p. 94.
91 *Lumley* v. *Ravenscroft* [1895] 1 Q.B. 683.
92 *Pickering* v. *Bishop of Ely* (1843) 2 Y. & C.Ch. 249; *Johnson* v. *Shrewsbury and Birmingham Rail Co.* (1853) 3 De G.M. & G. 914; *Ogden* v. *Fossick* (1862) 4 De G.F. & J. 426.
93 *Forrer* v. *Nash* (1865) 35 Beav. 167.
94 (1828) 4 Russ. 298 at p. 301.
95 Fry, *Specific Performance*, p. 219.
96 Ashburner, *Principles of Equity* (2nd ed.), pp. 404–405; Maitland, p. 311; Anson, *Principles of the Law of Contract* (22nd ed.), p. 515; Treitel, *Law of Contract* (2nd ed.), p. 696; Ames, *Lectures in Legal History*, p. 370.
97 (1828) 4 Russ. 298.
98 (1714) 2 Eq.Ca.Abr. 516.
99 *Ibid.* at p. 301; the signature of the pleadings by himself or by his agent provides the necessary evidence.
1 Ames, *op. cit.* at p. 374.

Much of the criticism of the rule of mutuality has been directed to the requirement that mutuality must exist at the time when the contract was made. We saw that a vendor who could not produce a good title could not compel a purchaser to take a conveyance. It was laid down however in *Hoggart* v. *Scott* [2] that a vendor may obtain specific performance if he can show a good title at the time of the hearing, even though he had none at the time when the contract was made. We will see also that the court may decree specific performance with compensation where there has been misdescription in the case of a contract for the sale of land.[3]

We saw also that there could be no specific performance of a contract where the obligation of one party was the performance of services. If however the plaintiff has already performed the services, he may enforce the contract.

> In *Wilkinson* v. *Clements*,[4] the plaintiff was the assignee of a contract under which he became entitled to a 99-year lease of several plots of land on condition that he erected certain houses on the plots. He built the required number of houses on two of the plots. The contract was construed as "divisible"[5]; so that the two plots could be considered on their own. It was held that the plaintiff was entitled to the grant of the leases of those two plots.

C. An Alternative Rule

These matters, among others, are considered in a famous article by James Barr Ames [6] in which he offers as an alternative to Fry's rule of mutuality a principle that "Equity will not compel specific performance by a defendant if, after performance, the common law remedy of damages would be his sole security for the performance of the plaintiff's side of the contract." [7] Such a formulation has not satisfied everyone,[8] but it is the basis of the rule accepted by the Restatement of Contracts.[9] In England, Fry's rule is often still stated

[2] (1830) 1 Russ. & M. 293; Tiley, p. 95; *Eastern Counties Railway* v. *Hawkes* (1855) 5 H.L.Cas. 331.
[3] *Post*, p. 50.
[4] (1872) L.R. 8 Ch.App. 96.
[5] *Ante*, p. 47.
[6] Ames, *Lectures in Legal History*, p. 370.
[7] *Ibid.* at p. 371.
[8] (1927) 36 Yale L.J. 897 (W. W. Cook).
[9] § 372. "The fact that the remedy of specific performance is not available to one party is not a sufficient reason for refusing it to the other party." § 373. "Specific enforcement may properly be refused if a substantial part of the agreed exchange for the performance to be compelled is as yet unperformed, and its concurrent or future performance is not well secured to the satisfaction of the court."

in its wide form. It is submitted that Ames' principle is much to be preferred.

10. Misdescription of Subject-Matter

A. Specific Performance Subject to Compensation

If the property agreed to be sold is incorrectly described in the contract, the vendor cannot fulfil his promise to transfer property which corresponds exactly with that which he contracted to convey. A frequent instance is an inaccurate measurement in the plan.[10] A misdescription is a term of the contract; the vendor is therefore in breach. It might be thought that there is no problem; surely the purchaser, being the party not in default, cannot be subjected to a decree of specific performance? But that theory would introduce a rigid rule capable of producing injustice. Is the purchaser, who for some reason does not wish to complete, to be allowed to repudiate on account of some trivial mistake in acreage, which in no way affects the value or utility of the property?

Equity adopts a more flexible approach; the circumstances may be such that justice will be done by compelling completion, notwithstanding the error, compensating the party who has suffered by allowing him a reduction in the price he had agreed to pay ("abatement"). On the other hand the misdescription may be so serious that to decree specific performance would be in effect to force the purchaser to take something wholly different from what he intended. If so, the only way of achieving justice may be to permit the purchaser to rescind; or to refuse to grant specific performance to the vendor.

B. Refusal of Specific Performance

The rule which has been developed is thus that a purchaser will not be forced to take something which is *different in substance* from that which he agreed to buy.[11] Differences of quality or quantity will not *by themselves* suffice as a defence to an action for specific performance (although of course they will give rise to a claim for compensation) unless they can fairly be said to make the property, as it in fact is, different in substance from that contracted to be sold.[12] A misdescription is substantial for this purpose if it so

[10] See *e.g.*, *Watson* v. *Burton* [1957] 1 W.L.R. 19.

[11] *Flight* v. *Booth* (1834) 1 Bing.N.C. 370; *Re Puckett and Smith's Contract* [1902] 2 Ch. 258; *Watson* v. *Burton* [1957] 1 W.L.R. 19.

[12] If a vendor contracts to sell a lease of Blackacre, a purchaser cannot be compelled to take an underlease; *Madeley* v. *Booth* (1845) 2 De G. & Sm. 718; nor if he contracts to sell a "registered freehold property," can he compel the

far affects " the subject-matter of the contract that it may be reasonably supposed, that, but for such misdescription, the purchaser might never have entered into the contract at all." [13] This will always be a question of fact in each case: obviously A, who has contracted to sell Blackacre to B, cannot force him to take Whiteacre, even if Whiteacre is larger, more valuable, and better suited to B's purposes. It is often difficult to say whether a misdescription of the area of land agreed to be sold involves a difference of substance or of quantity; the rule is " easy to be understood, though often difficult of application." [14]

C. The Purchaser's Choice

So much is true where a vendor seeks to compel a purchaser to take something different from that contracted to be sold. It is only just to give the purchaser the option of insisting on completion, and being paid compensation [15] for what he has lost. If it were not so, a person in default could in effect take advantage of his own wrong. " For the purpose of this jurisdiction, the person contracting under those circumstances, is bound by the assertion in his contract; and if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement; and the Court will not hear the objection by the vendor, that the purchaser cannot have the whole." [16] In short the purchaser has a choice: he may elect to take the property,[17] notwithstanding that it may be substantially different from the contract description.

D. Conditions of Sale

The above is true of " open " contracts, but the parties are perfectly free to make their own conditions to regulate what is to happen if there is a misdescription. In the case of contracts for the sale of land, virtually all contracts prepared by a solicitor [18] will be made

purchaser to take a possessory (as distinct from *absolute*) freehold title; *Re Brine and Davies' Contract* [1935] Ch. 388.

13 *Per* Tindal C.J. in *Flight* v. *Booth* (1834) 1 Bing.N.C. 370 at p. 377.

14 *Per* Lord Esher M.R., in *Re Fawcett and Holmes' Contract* (1889) 42 Ch.D. 150 at p. 156; *cf. Watson* v. *Burton* [1957] 1 W.L.R. 19; *Dyer* v. *Hargrave* (1805) 10 Ves.Jr. 505.

15 Which, however, he must generally claim before completion. Otherwise, unless he could not have discovered the defect, he will be deemed to have waived his claim to compensation; *Joliffe* v. *Baker* (1883) 11 Q.B.D. 255.

16 *Per* Lord Eldon L.C. in *Mortlock* v. *Buller* (1804) 10 Ves.Jr. 292 at p. 316.

17 In the absence of special circumstances, *e.g.*, if he was himself aware of the misdescription at the date of the contract; *Castle* v. *Wilkinson* (1870) L.R. 5 Ch.App. 534.

18 A statutory form of conditions of sale is incorporated into all contracts by correspondence unless excluded by a contrary intention; L.P.A. 1925, s. 46; S.R. & O. 1925, No. 779. These conditions, however, do not specifically deal with misdescription.

subject to the conditions contained in either the Law Society's General Conditions of Sale,[19] or the National Conditions of Sale.[20] In every case, therefore, the first question must be: what does the contract provide? But even then caution is necessary, since the courts have been reluctant to permit either party to contract out of the rights conferred on him by equity. Reference should be made to the standard textbooks on conveyancing for details of these conditions, and the interpretation which has been placed upon them by the courts.[21]

E. Want of Good Title

The court will not force a doubtful title on a purchaser. The phrase " defect in title " is loosely used in some of the cases to indicate that the vendor, through some material error in description, fails in effect to convey to the purchaser the property he intended to buy. In other cases the expression may be used in a more literal sense; where, for example, the vendor's land is burdened with restrictive covenants.[22] Yet there are other cases where there is not merely a defect in the vendor's title, but no title at all. Clearly, the purchaser cannot be compelled to take a bad title, nor be allowed to refuse a good one. Between the good and the bad are an infinite variety of doubtful titles, and the question inevitably arises of drawing a line between those titles which a purchaser will, and those which he will not, be compelled to accept. The test is whether there is likely to be litigation. If the doubt is one of law, the court will normally resolve it [23] but if it is one of fact, or mixed law and fact (*e.g.*, whether a person had notice of an equitable interest at the time of a purchase),[24] the court will not do so. The purchaser will thus be entitled to rescind, unless the vendor removes the doubt. The court will not compel a party to purchase a law suit.[25]

F. Amount of Damages

For breach by either party, the normal rule is that the plaintiff can recover his loss as damages. Where however the sale goes off because the vendor cannot produce a good title the anomalous rule

19 *The Law Society's Conditions of Sale* 1953, conditions 34, 35.
20 *The National Conditions of Sale* (17th ed.), condition 14.
21 *e.g.*, Farrand, *Contract and Conveyance*, p. 42 *et seq.*; *Emmet on Title* (15th ed.). p. 15 *et seq.*
22 *Re Nisbet and Potts' Contract* [1906] 1 Ch. 386; Tiley, p. 22.
23 *Wilson* v. *Thomas* [1958] 1 W.L.R. 422.
24 *Re Handman and Wilcox's Contract* [1902] 1 Ch. 599; See also *Selkirk* v. *Romar Industries Ltd.* [1963] 1 W.L.R. 1415.
25 *Re Nichols and Von Joel's Contract* [1910] 1 Ch. 43 at p. 46.

laid down in *Flureau* v. *Thornhill*,[26] and adopted by the House of Lords in *Bain* v. *Fothergill*,[27] lays down that the purchaser is limited to the recovery of his deposit and interest thereon, together with the expenses to which he has been put in relation to the transaction. The reason for the rule is the great difficulty in English law of providing a title to land.[28] An action in deceit may lie if the vendor was fraudulent.[29]

However it has been held that the rule in *Bain* v. *Fothergill*[27] does not apply to a case in which the vendor could make a good title but would not do so.[30] The purchaser may then recover damages for the loss of the bargain; but if the vendor could make no title at all, and knew it, the purchaser can recover only his deposit, together with his actual expenses in relation to his efforts to trace the title. The rule applies to leaseholds.[31] But with personalty generally the ordinary rules of remoteness of damages for breach of contract apply.[31a]

11. Specific Performance and Third Parties

Claims for specific performance are usually made between the parties to the contract. Other difficulties arise where the issue is between assignees, or where the person to be benefited was not a party to the original contract.

A. Specific Performance between Assignees

Cases on agreements for leases suggest that the right to specific performance of an agreement will pass with the assignment of the interest of the lessor or of the intended lessee.[32] "It is well settled that the assign of one of the parties to a contract can obtain specific performance of that contract against the other contracting party."[33] And, since it has been held that Law of Property Act 1925, ss. 141 and 142 apply although the lease is not under seal,[34] it follows that the burden of the lessor's covenants in an agreement for a lease will also run on the assignment of the freehold.

[26] (1776) 2 W.Bl. 1078.
[27] (1874) L.R. 7 H.L. 158.
[28] *Ibid.* at 210 *per* Lord Hatherley; *J. W. Cafés* v. *Brownlow Trust* [1950] 1 All E.R. 894 at p. 896 *per* Lord Goddard C.J.
[29] *Ibid.* at 207 *per* Lord Chelmsford.
[30] *Engel* v. *Fitch* (1868) L.R. 3 Q.B. 314; *Re Daniel* [1917] 2 Ch. 405.
[31] *J. W. Cafés* v. *Brownlow Trust* [1950] 1 All E.R. 894.
[31a] *Collins* v. *Howard* [1949] 2 All E.R. 324.
[32] *Manchester Brewery* v. *Coombs* [1901] 2 Ch. 608; *Rickett* v. *Green* [1910] 1 K.B. 253.
[33] *Per* Farwell J. in *Manchester Brewery* v. *Coombs*, *supra*, at p. 616.
[34] *Rickett* v. *Green*, *supra*; *Rye* v. *Purcell* [1926] 1 K.B. 446; *Breams Property Investment Co.* v. *Stroulger* [1948] 2 K.B. 1; *Boyer* v. *Warbey* [1953] 1 Q.B. 234.

It has been held however that where a person holding under an agreement for a lease assigns his interest, the assignee is not liable on the covenants.[35] For the lessor is not entitled to specific performance against the assignee. ". . . suppose, in the case of an agreement for a lease, the intended lessee has assigned the benefit of the contract, can this Court, at the instance of the intended lessor, enforce the payment of the rent or the performance of the covenants by the assignee of the contract. I take it most clearly not; for there is no privity of contract between the lessor and the assignee."[36] "It is impossible that specific performance of a contract can be decreed against a person with whom there is neither privity of contract nor privity of estate."[37]

It is difficult to see why this rule should apply in the case of agreements for leases. The lessor ought to be able to enforce covenants against an assignee to whom the intended lessee has assigned his rights. And if there is any meaning in the principle of mutuality, it is strange that the assignee can have specific performance against the lessor, but not the lessor against the assignee. It is perhaps relevant that the only case in which the issue appears to have arisen since 1873 is *Purchase* v. *Lichfield Brewery*,[38] where the defendant was a mortgagee by assignment who did not enter into possession; it would be harsh to compel him to pay the rent.[39]

However that may be, the rule, if it is correct, appears to be limited to this particular case. With estate contracts generally, the liability to specific performance after an assignment passes to the assignee unless he can show that he is a bona fide purchaser for value without notice[40]; and, since 1925, this means that his liability depends upon registration.[41] If this were not so, the whole system of estate contracts would fall to the ground. It is submitted that there is no good reason why, in the case of estate contracts at least,[42] the right, and the liability, to specific performance should not pass on an assignment, subject always to the right of a bona fide purchaser of a legal estate for value without notice to take free of this equitable obligation.

35 *Cox* v. *Bishop* (1857) 8 De G.M. & G. 815; *Purchase* v. *Lichfield Brewery* [1915] 1 K.B. 184.
36 Turner L.J. in *Cox* v. *Bishop, supra*, at p. 824.
37 *Per* Lush J. in *Purchase* v. *Lichfield Brewery* [1915] 1 K.B. 184 at p. 189.
38 [1915] 1 K.B. 184.
39 *Williams* v. *Bosanquet* (1819) 1 Brod. & B. 238; the situation is one which cannot arise after 1925; L.P.A. 1925, s. 86 (1); *post*, p. 535.
40 *Ante*, p. 21.
41 L.C.A. 1925, s. 10 (1); *ante*, p. 25.
42 Including therein, an agreement for a lease.

B. Specific Performance for the Benefit of Third Parties

A number of problems will arise if A has contracted with B to confer a benefit on C. Sometimes,[43] C can enforce the contract in his own right, and obtain either an award of damages or specific performance according to the usual principles. If, however, because of the usual "privity" rule,[44] C cannot enforce the contract himself, the question is whether B may obtain specific performance, compelling A to confer the benefit on C.

> In *Beswick* v. *Beswick*,[45] one Peter Beswick, a coal merchant who wished to retire, made an arrangement with his nephew under which the business was transferred to the nephew, and the nephew promised to employ Peter as consultant for a weekly wage, and after his death to pay to Peter's widow £5 per week for her life. Payments were made to Peter during his lifetime, but soon after his death ceased to be paid to his widow. The widow took out letters of administration of Peter's estate and sued both as administratrix and in her own right under the contract.
>
> The House of Lords held that she was entitled as administratrix to specific performance of the promise to make the weekly payments to her as Peter's widow. She was unable to sue in her own right because of the rule of privity, which was not affected in this respect by Law of Property Act 1925, s. 56.[46]

Viewed from the point of view of the principles previously discussed relating to specific performance, the difficulties which faced the widow in her action as administratrix were essentially threefold: (a) Peter's estate, which she represented, had lost nothing by the breach; (b) the widow, in her own capacity, had suffered the loss but had no right of action; (c) the agreement was for the payment of money and was not the type of agreement where breach is usually remedied by a decree of specific performance.[47]

The widow, as administratrix, overcame them all. Lord Upjohn thought that (a) was an argument in favour of specific performance; "... the court ought to grant a specific performance order all the more because damages *are* nominal."[48] She had no other effective remedy; "justice demands that [the promisor] pay the price and this can only be done in the circumstances by equitable relief."[48]

[43] For instance, where there is a trust of a chose in action, *post*, p. 145.
[44] *Scruttons Ltd.* v. *Midland Silicones Ltd.* [1962] A.C. 446; *post*, p. 629.
[45] [1968] A.C. 58; Tiley, p. 82; see also *Chitty on Contracts* (23rd ed.), para. 1545 *et seq.*
[46] Reversing the majority of the Court of Appeal on this point: [1966] Ch. 538.
[47] *Ante*, p. 40.
[48] *Beswick* v. *Beswick* [1968] A.C. 58 at p. 102.

This, however, is to disregard the principle. The principle is that equitable remedies are available where the legal remedy is inadequate to compensate for the loss. It is not that equitable remedies are available where the plaintiff has suffered no loss; nor where an independent person has suffered a loss for which there is no cause of action.

Their Lordships found no difficulty in treating the case as a suitable one for specific performance. "Had [the promisor] repudiated the contract in the lifetime of [the promisee] the latter would have had a cast-iron case for specific performance."[49] The orthodox view has been that specific performance will not be ordered in cases where the promise is to pay money—unless[50] the plaintiff is a vendor or lessor against whom the purchaser or lessee could have demanded specific performance. *Beswick* v. *Beswick*[51] may have been regarded as such a case, for the nephew "could on his part clearly have obtained specific performance of it if Beswick senior or his administratrix had defaulted."[52] That, it is submitted, is questionable; for the contract was essentially for the sale of the goodwill of the business; such a contract is not normally specifically enforceable, in contrast to a contract to sell premises along with the goodwill.[53]

It is said also that a contract to pay an annuity is specifically enforceable. In *Adderly* v. *Dixon*,[54] Leach M.R. said of annuities[55]: "Damages might be no complete remedy, being to be calculated merely by conjecture; and to compel the plaintiff in such a case to take damages would be to compel him to sell the annual provision during his life for which he had contracted, at a conjectural price."

While such a proposition may have been sound in 1824, it is questionable whether it is sound today. The development of the law and practice of life assurance and of the actuarial technique of calculation of values of life interests has made an annuity and a capital sum in effect interchangeable. Annuities are freely purchased from insurance companies in exchange for capital payments—the transaction having in many cases substantial fiscal advantages for the purchaser. And an annuity can similarly be freely sold for a capital sum. Thus the conjectural element is less marked than it

[49] *Ibid.* at p. 98, see also, as quoted at pp. 90 and 99, *Drimmie* v. *Davies* [1899] 1 Ir.R. 176 at p. 190, *per* Holmes J.
[50] *Ante*, p. 39.
[51] [1968] A.C. 58.
[52] *Ibid.* at p. 89, *per* Lord Pearce.
[53] *Baxter* v. *Connolly* (1820) 1 J. & W. 576; *Darbey* v. *Whitaker* (1857) 4 Drew. 134 at pp. 139, 140.
[54] (1824) 1 Sim. & St. 607; (1966) 29 M.L.R. 657 at p. 663 (G. H. Treitel).
[55] *Ibid.* at p. 611.

was over a century ago. The value of an annuity need not be regarded as depending on the life of the annuitant; but upon the capital sum for which it could be sold in his particular case. If it is so regarded it becomes more difficult to maintain that the award of a capital sum in damages would be an inadequate remedy. If the plaintiff was awarded damages, and desired the annuity, all he has to do is to buy one.

The cases on which their Lordships relied [56] to support the view that the contract to pay was specifically enforceable, at the instance of a personal representative, were all cases either of a contract to transfer land or contracts to pay an annuity. It is possible to treat *Beswick* v. *Beswick* [57] as consistent with authority by saying that there was mutuality, that the contract (being to pay an annuity) was capable of specific performance, and that the common law remedy of damages (assuming them to be nominal) was inadequate. The plaintiff barely succeeds on the first two; and only on the third by relying on cases which uphold it without explaining the logical dilemma of holding an award of nominal damages inadequate where no loss was suffered by the party able to sue.

In spite of the opportunities which exist for criticism in relation to orthodox doctrine, the House of Lords should rather be applauded for taking a broad equitable view of the situation. There was "an unconscionable breach of faith [and] the equitable remedy sought is apt." [58] Lord Pearce and Lord Upjohn both approved the dictum of Windeyer J. in *Coulls* v. *Bagot's Executor and Trustee Co. Ltd.* in which he said [59]: "It seems to me that contracts to pay money or transfer property to a third person are always, or at all events very often, contracts for breach of which damages would be an inadequate remedy—all the more so if it be right (I do not think it is) that damages recoverable by the promisee are only nominal. . . . I see no reason why specific performance should not be had in such cases . . . but of course not where the promise was to render some personal services. There is no reason today for limiting by particular categories, rather than by general principle, the cases in which orders for specific performance will be made." There were no technical or practical difficulties preventing an award of specific performance and "justice

[56] *Keenan* v. *Handley* (1864) 2 De G.J. & S. 283; *Hohler* v. *Aston* [1920] 2 Ch. 420; *Drimmie* v. *Davies* [1899] 1 I.R. 176; *Coulls* v. *Bagot's Executor and Trustee Co.* (1967) 40 A.L.J.R. 471.

[57] [1968] A.C. 58.

[58] *Ibid. per* Lord Hodson at p. 83.

[59] (1967) 40 A.L.J.R. at p. 487.

demands that [the promisor] pay the price and this can only be done in the circumstances by equitable relief." [60]

This chapter began by indicating how narrow was the scope of the remedy of specific performance in practice. Other systems of law tend to be much more free in their use of this type of remedy. *Beswick* v. *Beswick* [61] indicates a willingness in the House of Lords to make freer use of the remedy in the interests of justice. The case is however concerned with its own particular problem of the covenant to pay to a third party.[62] Time alone will tell whether this more liberal approach will be applied to other, and more usual, aspects of the law of specific performance.

[60] *Ibid*. at p. 102 *per* Lord Upjohn.
[61] [1968] A.C. 58.
[62] *Post*, p. 146 *et seq*.

CHAPTER 3

INJUNCTIONS

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1. JURISDICTION

AN injunction is an order by the court to a party to the effect that he shall do or refrain from doing a particular act. Originally the Court of Chancery alone [1] had jurisdiction to grant an injunction. This inevitably led to much duplication of proceedings; as where the plaintiff required an injunction to enforce a *legal* cause of action. The Common Law Procedure Act 1854 gave to common law courts a power to grant injunctions in certain cases. The present jurisdiction is governed by the Judicature Acts which vested in the High Court the jurisdiction of the Court of Chancery and of the common law courts. Section 25 (8) of the Act of 1873 provides that "the High Court may grant . . . an injunction . . . by an interlocutory order in all cases in which it appears to the court to be just or convenient to do so." [2] An interlocutory order is one which is made prior to the final judgment in the action, and a jurisdiction to grant injunctions in such circumstances must *a*

[1] Or the Court of Exchequer in its equity jurisdiction, *ante*, p. 3.
[2] Judicature Act 1925, s. 45; *L.* v. *L.* [1969] P. 25.

fortiori include a power to do so after a full hearing. The jurisdiction however is not so wide as would appear from a first reading of the section. For although the court has jurisdiction to grant an injunction whenever it appears to be just or convenient to do so, the jurisdiction is exercised, not on the individual preference of the judge, but "according to sufficient legal reasons or on settled legal principles."[3] "It must be 'just' as well as 'convenient'."[4] The Act "has not revolutionised" but "has to some extent enlarged" the jurisdiction.[5] There have been differences of opinion as to the extent of this enlargement to areas where injunctions had not in fact been granted before 1875. The better view is to leave the matter as one of discretion rather than of jurisdiction, thus enabling the merits of new situations to be dealt with as they arise.[6]

2. Types of Injunction

A. Prohibitory and Mandatory

The most common and natural form of an injunction, as the name implies, is that it is prohibitory or restrictive. However, if the unlawful act has been committed and an order restraining its commission is therefore meaningless, justice can sometimes be done by issuing a mandatory injunction ordering the act to be undone. Thus if, while A has been absent abroad, B has built a wall which obstructs his ancient lights, the order which A requires is one requiring B to pull down the wall. At one time the negative character of an injunction used to be insisted upon; if the court intended to order a party to pull down a wall, the order would be that he should refrain from permitting the wall to remain on his land. A mandatory injunction is now couched in positive form,[7] but just for this reason it may be harder to obtain. For example, it has been held that it ought not to issue to compel a ferry owner to run a ferry, when it could only be run at a loss.[8] But the fact that a local authority may have to borrow money, or get a building licence to comply with a mandatory injunction is a ground, not for refusing the remedy, but for granting it subject to a suspension.[9]

[3] *Per* Jessel M.R. in *Beddow* v. *Beddow* (1878) 9 Ch.D. 89 at p. 93.
[4] *Per* Jessel M.R. in *Day* v. *Brownrigg* (1878) 10 Ch.D. 294 at p. 307.
[5] *Cummins* v. *Perkins* [1899] 1 Ch. 16, 20.
[6] See *Argyll* v. *Argyll* [1967] Ch. 302, at p. 345; *cf.* note 25 at p. 63, *post*.
[7] *Jackson* v. *Normanby Brick Co.* [1899] 1 Ch. 438.
[8] *Att.-Gen.* v. *Colchester Corporation* [1955] 2 Q.B. 207; *Morris* v. *Redland Bricks Ltd.* [1969] 2 W.L.R. 1437.
[9] *Pride of Derby Angling Association* v. *British Celanese Co.* [1953] Ch. 149.

B. Perpetual and Interlocutory

Prohibitory or restrictive injunctions may be perpetual or interlocutory. "Perpetual" does not mean necessarily that the effect of the order must endure for ever; it means that the order will finally settle the present dispute between the parties, being made as the result of an ordinary action, the court having heard in the ordinary way the arguments on both sides. But a plaintiff may not always be able to wait for the action to come on in the normal course; it may be that irreparable damage will be done to him if the defendant is not immediately restrained. If such is the case, the plaintiff will serve on him a notice that on the next motion day his counsel will apply to the court for an injunction. The service of this notice will enable the defendant's counsel also to be heard, if he wishes, but the hearing will not be a final decision on the merits of the case. If the plaintiff's affidavit has made out a sufficient case, the judge will grant an interlocutory injunction, which is effective only until the trial of the action.[10]

C. Ex Parte Injunctions

But if the plaintiff cannot even wait until the next motion day, he is still not helpless, for he can apply for an *ex parte* injunction, which will hold good until the next motion day, by which time notice can have been served on the defendant, who will then have a chance of opposing the plaintiff's application for an interlocutory injunction. The phrase "*ex parte*" signifies that the court has not had an opportunity of hearing the other side.

D. Quia Timet Injunctions

A *quia timet* injunction is one which issues to prevent an infringement of the plaintiff's rights where the infringement is threatened, but has not yet occurred. The jurisdiction is one of long standing, and exists in relation to both perpetual and interlocutory injunctions, but courts take great care before exercising it. The plaintiff must show a very strong probability of a future infringement, and that the ensuing damage will be of a most serious nature.[11] A defendant is not to lose his rights on anything short of the virtual certainty of unjustifiable injury to the plaintiff.

[10] *Jones* v. *Pacaya Rubber and Produce Co.* [1911] 1 K.B. 455 at p. 457 *per* Buckley J.

[11] *Fletcher* v. *Bealey* (1885) 28 Ch.D. 688; *Att.-Gen.* v. *Nottingham Corporation* [1904] 1 Ch. 673; *Morris* v. *Redland Bricks Ltd.* [1969] 2 W.L.R. 1437.

3. Principles Applicable to the Issue of Injunctions

A. Injunctions will be Granted to Protect Rights

Several points can be brought together under this general heading. To begin with, "It is a fundamental rule that the court will only grant an injunction at the suit of a private individual to support a legal right." [12] The right must be a right in the plaintiff; thus the court will not even consider granting an injunction to a private individual to restrain what the individual happens to think is criminal activity.[13] He has no rights in the matter, though the Attorney-General has duties.[14] An individual may of course have a special interest in the matter, as for instance where there has been an invasion of his property, or a threatened publication of information confidential to himself, and in such a case the jurisdiction to grant him an injunction exists save where statute has, for instance by providing an exclusive remedy, excluded it.[15] But ordinarily, public rights are protected by the Attorney-General; and the view of the court is that injunctions should be granted at his request to prevent clear breaches of the law irrespective of the weighing of benefits and detriments which characterises most other injunction cases.[16]

A right that is to be protected by an injunction must be one that is known to law or equity. Thus it must not be one of which cognisance will be taken only in ecclesiastical law.[17] The point was also firmly made in *Day* v. *Brownrigg*.[18]

> The plaintiff lived in a house that had been called "Ashford Lodge" for sixty years. The defendant lived in a smaller neighbouring house called "Ashford Villa." The defendant started to call his house "Ashford Lodge" and the plaintiff sought an injunction to restrain him from doing so. Malins V.-C. would have been willing to grant an injunction on the ground that an injury would otherwise be suffered by the plaintiff, but the Court of Appeal took the view that there was no violation of a legal or equitable right in the plaintiff so that no injunction could be granted.[19]

[12] *Per* Lord Denning M.R. in *Thorne* v. *B.B.C.* [1957] 1 W.L.R. 1104 at p. 1109.
[13] *Thorne* v. *B.B.C., supra* (alleged racial discrimination by the B.B.C.).
[14] *R.* v. *Commissioner of Police of the Metropolis* [1968] 2 Q.B. 118. The right to bring a private prosecution is of course a different matter.
[15] *Stevens* v. *Chown* [1901] 1 Ch. 894; *Argyll* v. *Argyll* [1967] Ch. 302.
[16] *Att.-Gen.* v. *Bastow* [1957] 1 Q.B. 514; *Att.-Gen.* v. *Harris* [1961] 1 Q.B. 74; Tiley, p. 104; *post*, p. 77.
[17] *Att.-Gen.* v. *Dean and Chapter of Ripon Cathedral* [1945] Ch. 239.
[18] (1878) 10 Ch.D. 294; *Beddow* v. *Beddow* (1878) 9 Ch.D. 89, 93.
[19] See also *Montgomery* v. *Montgomery* [1965] P. 46.

The legal or equitable right in question does not, however, have to be one based on property. This is evidenced by the case of libel, for instance, though in practice the courts will not often grant an injunction restraining the repetition of defamatory statements unless some actual loss to the plaintiff is likely.[20] Similarly, in the cases of injunctions to restrain unlawful expulsion from a club or association, the *jurisdiction* to intervene is said to depend on the mutual, and possibly implied, contractual rights of the parties; though the actual *exercise* of the jurisdiction may be limited where proprietary rights, or rights analogous to them, such as the right to earn one's livelihood, are not affected.[21]

The courts have gone even further than this in protecting confidential material. Before 1875, it was accepted that equity would, in suitable cases, restrain a defendant from revealing or distributing information or other material obtained in confidence,[22] regarding the breach of confidence as an equitable wrong needing protection by injunction even though it was not easy to say that it was a wrong protected by any other remedy. And it has now been accepted [23] that the jurisdiction in this type of case does not depend on any notion of property or contract, but that an obligation of confidence can exist by virtue of the circumstances, and independently of any actual agreement to that effect. Thus an obligation of confidence exists in respect of communications between husband and wife which will be enforced not only between the parties but which will cover threatened publication by third parties.[24] "It is the policy of the law (which is the basis of the court's jurisdiction) to preserve the close confidence and mutual trust between husband and wife." [25] It is necessary, however, that the plaintiff should himself have an interest in preventing the disclosure.[25a] We have clearly moved a long way from a narrow view of *Day* v. *Brownrigg*,[26] but, it is safer to add, only in relation to specific areas of the law. But as for personal confidences, so for

[20] *Hermann Loog* v. *Bean* (1884) 26 Ch.D. 306; *post*, p. 76; *Fraser* v. *Evans* [1969] 1 Q.B. 349.

[21] *Lee* v. *The Showmen's Guild of Great Britain* [1952] 2 Q.B. 329, especially at 341–342 *per* Denning L.J.

[22] *Prince Albert* v. *Strange* (1849) 1 H. & T. 1 (copies of etchings made by the Prince and Queen Victoria: distribution restrained).

[23] See particularly *Argyll* v. *Argyll* [1967] Ch. 302 at p. 322; and *Fraser* v. *Evans* [1969] 1 Q.B. 349 at p. 361.

[24] *Ashburton* v. *Pape* [1913] 2 Ch. 469, applied in *Argyll* v. *Argyll*, *supra*, at p. 333.

[25] *Argyll* v. *Argyll*, *supra*, at p. 332. Adultery by the spouse claiming protection by injunction does not release the other spouse from his duty of confidence, so an injunction is not refused on the ground of adultery alone.

[25a] *Fraser* v. *Evans*, *supra*.

[26] (1878) 10 Ch.D. 294. *Cf.*, on unlawful trade competition, *J. Bollinger* v. *Costa Brava Wine Co.* [1960] Ch. 262 at p. 283.

confidential commercial information, which will be restrained from publication along similar lines.[27] Here too, it would now seem preferable to base the jurisdiction on confidence as such and not on a fiction of contract or an interest in property. Most probably, here too, injunctions will be granted, in cases needing them, against third parties.[28]

B. The Discretionary Element in Injunctions

Leaving apart the case of injunctions to restrain breaches of negative stipulations in contracts,[29] it is axiomatic that the jurisdiction to grant injunctions is purely discretionary. But, as with specific performance, the court, in exercising its discretion, pays attention to certain factors established by the precedents as being of particular relevance. The factors relevant to perpetual injunctions should be considered first.

i. Perpetual Injunctions. If a plaintiff has established the existence of a right, infringement of that right should be restrained.

(a) *Award of Damages Sufficient.* But in some cases, award of damages will suffice to protect the right. In such cases, injunctions will not be granted. The Chancery Amendment Act 1858 (Lord Cairns' Act) enabled damages to be awarded in lieu of an injunction, or in lieu of specific performance, wherever the court could say that there was *jurisdiction* to grant injunction or specific performance (even though no damages could be recovered at law for the wrong in question); thus damages can be awarded for breach of a restrictive covenant by a defendant who is bound by the covenant only in equity.[30] Lord Cairns' Act has disappeared from the statute book, but the power to grant damages in lieu remains, and there is no need to distinguish the ground of jurisdiction. For the principle is the same in all cases; the court will not give damages instead of an injunction if damages will not adequately protect the plaintiff's right.

(b) *Cases of Minor Damage.* The extent of damage is not the crucial point. The smallness of the damage suffered by a plaintiff, and the fact that a monetary sum could easily be assessed to

[27] *e.g.*, *P. A. Thomas & Co.* v. *Mould* [1968] 2 Q.B. 913.

[28] *Printers & Finishers Ltd.* v. *Holloway* [1965] 1 W.L.R. 1; Jackson, *Principles of Property Law*, pp. 386, 388.

[29] Considered, *post*, p. 68.

[30] *Baxter* v. *Four Oaks Properties Ltd.* [1965] Ch. 816. That delay, for instance, might have prevented an injunction being granted in a particular case is irrelevant; distinguish a case of *jurisdiction* being lost through the passage of time. See generally *Lavery* v. *Pursell* (1888) 39 Ch.D. 508, *per* Chitty J. at p. 519.

compensate for it, is no reason for withholding an injunction if the consequence is that the defendant is in effect compulsorily "buying" a right which it is the plaintiff's right to sell only if he wants to.[31] This is especially true of cases in which the plaintiff has trespassed on the defendant's property, as by laying water pipes under it, and in other cases of interference with rights of ownership: actual loss does not need to be shown before an injunction is granted to remedy the trespass.[32] But there may be cases in which injunctions will be refused even on such facts. One such case was *Armstrong* v. *Sheppard & Short*,[33] where the plaintiff had misled the court and the defendant, and had suffered no real damage; Lord Evershed M.R. said "A proprietor who establishes a proprietary right is *ex debito justitiae* entitled to an injunction, unless it can be said against him that he has raised such an equity that it is no longer open to him to assert his legal or proprietary right."[34]

It is obvious that these various factors are not to be considered in isolation, and no complete list can be given of instances where an injunction will be refused. The important thing to grasp is the court's protection of rights as such; but an injunction may not be granted to protect an established right where damages are a completely adequate remedy, or where the plaintiff has disentitled himself to an injunction. An instance of damages being adequate is provided by *Fishenden* v. *Higgs and Hill Ltd.*,[35] in which the defendants erected a building that obstructed the plaintiff's right to light in a manner that justified substantial damages but not, by reason of the very high property values involved and the conduct of the defendant, an injunction. Examples of a plaintiff disentitling himself to an injunction occur in cases of substantial delay, acquiescence,[36] and in cases where a plaintiff is himself in breach to a material degree,[37] as well as in cases where the court is not impressed with the plaintiff on the merits.[38]

[31] *Wood* v. *Sutcliffe* (1851) 2 Sim.(N.S.) 163.
[32] *Goodson* v. *Richardson* (1874) L.R. 9 Ch.App. 221.
[33] [1959] 2 Q.B. 384. Another case of damage being so trivial that an injunction was refused is *Behrens* v. *Richards* [1905] 2 Ch. 614.
[34] [1959] 2 Q.B. 384 at p. 394.
[35] (1935) 153 L.T. 128. *Leeds Industrial Co-operative Society Ltd.* v. *Slack* [1924] A.C. 851 established that damages could be awarded in lieu of an injunction where injury was only threatened (as is often the case where rights of light are in issue) as well as where injury has already occurred. The opinion of Viscount Finlay contains a valuable account of Lord Cairns' Act. For the strict principles governing *quia timet* injunctions, see *ante*, p. 61.
[36] *Cf. Richards* v. *Revitt* (1877) 7 Ch.D. 224 and *Sayers* v. *Collyer* (1884) 28 Ch.D. 103.
[37] *Besant* v. *Wood* (1879) 12 Ch.D. 605.
[38] See *Shelfer* v. *City of London Electric Lighting Co.* [1895] 1 Ch. 287 at p. 317 *per* Lindley L.J.; Tiley, p. 123; *Colls* v. *Home & Colonial Stores* [1904] A.C. 179 at p. 193 *per* Lord Macnaghten, and *cf. Armstrong* v. *Sheppard & Short*

(c) *The Defendant's Difficulty in Compliance.* A further factor that must be mentioned is the difficulty that a defendant will experience in complying with an injunction. This, like all other factors, will be assessed against his general conduct, but he will not be ordered to do the impossible.[39] But if the court sees no ground for relieving him, a defendant may be ordered to comply with an injunction even though the expense of doing so might exceed the potential loss of the plaintiff. In *Morris* v. *Redland Bricks Ltd.*,[40] the Court of Appeal decided to order a defendant, who had by his excavation of his own land caused the plaintiff's land (which the plaintiff used for making his livelihood as a market gardener) to be liable to subsidence, to shore up his land at a cost of some £30,000, though the plaintiff's loss could not exceed some £1,600. But the House of Lords discharged the order, as the injunction was a mandatory one, in granting which the courts must pay great regard to the possible financial consequences for the defendant, and to his manner of conduct.[41]

ii. Interlocutory Injunctions. Interlocutory injunctions raise somewhat different considerations. The jurisdiction is related not to the most just method of protecting established rights, but to the most convenient method of preserving a *status quo* while rights are established. The onus lies on a plaintiff to show his need for an interlocutory injunction. His first task is to show that he has a prima facie case. This does not mean that he has to prove his case before he can claim interlocutory relief, but only that he has a substantial case to be considered which may very well succeed when it comes to be heard.[42] Where the likelihood of success is rather problematical, as when the facts are in serious dispute, an interlocutory injunction will not usually be granted.[43] Secondly, he must show that, if an interlocutory injunction is not granted, he will (on the assumption that his case will succeed) have suffered loss which is both substantial and irreparable. An example of an irreparable loss is the distribution of a dividend to shareholders on the basis of supposedly erroneous calculations; those whose interests would be thereby prejudiced can restrain the distribution.[44] Another is loss of trade when a rival railway company blocks up access to the plaintiff's

Ltd., supra. But contrast the reasonable and responsible conduct of the defendants in *Bridlington Relay Ltd.* v. *Yorkshire Electricity Board* [1965] Ch. 436.

39 See generally *Att.-Gen.* v. *Colney Hatch Lunatic Asylum* (1868) L.R. 4 Ch.App. 146.

40 [1969] 2 W.L.R. 1437. See esp. pp. 1444–1445 *per* Lord Upjohn.

41 *Att.-Gen.* v. *Colchester Corporation* [1955] 2 Q.B. 207.

42 *Challender* v. *Royle* (1887) 36 Ch.D. 425 at p. 436 *per* Cotton L.J.

43 *Mitchell* v. *Henry* (1880) 15 Ch.D. 181 at p. 195 *per* Cotton L.J.

44 *Bloxam* v. *Metropolitan Ry.* (1868) L.R. 3 Ch.App. 337.

station: the loss cannot be measured but may be great.[45] Thirdly, he must show that the balance of convenience is in favour of the injunction being granted. This is an anxious jurisdiction for the court to exercise. Both parties to the action may stand to lose according to the way in which the discretion is exercised. Should a commercial undertaking be stopped because, it is said, the safety of the property of others is threatened by it and there is no right to continue it?[46] The relative financial and aesthetic values of the undertaking and the property obviously enter into such a decision; an injunction might well be granted to prevent subsidence due to mining under Coventry Cathedral though not to prevent subsidence under houses of comparatively small worth nearby. It is obviously impossible, in the state of knowledge before trial, to be absolutely certain what is the wisest course and the court can do no more than weigh all the factors. A plaintiff will, in most cases, be put on terms as to payment of damages in the event that the injunction is discharged at the trial as having been granted without good cause; but a defendant may also be put on similar terms as a condition of an injunction not being granted.[47] Finally, of course, the conduct of the parties will be taken into account.[48] But delay or acquiescence, in particular, is much more likely to cause an interlocutory injunction to be withheld from a plaintiff than it would in the more serious case of a perpetual injunction.[49]

4. Injunctions in Particular Situations

A. Injunctions to Restrain Judicial Proceedings

The common injunction[50] was abolished by section 24 (5) of the Judicature Act 1873,[51] which provided that matters of equity which might previously have justified the issue of a common injunction may now be advanced as defences to a common law action. Thus proceedings in the High Court, once commenced, are not subject to an injunction; but the initiation of High Court proceedings may be restrained in suitable cases.[52]

[45] *L. & N.W.Ry.* v. *L. & Y.Ry.* (1867) L.R. 4 Eq. 174.
[46] *Hilton* v. *Granville* (1841) Cr. & Ph. 283 (a mining case—injunction refused). *Cf. Newson* v. *Pender* (1884) 27 Ch.D. 43. The court will only very rarely issue a mandatory interlocutory injunction: *Daniel* v. *Ferguson* [1891] 2 Ch. 27.
[47] *Elwes* v. *Payne* (1879) 12 Ch.D. 468.
[48] See, for instance, *Daniel* v. *Ferguson, supra*; *Hampstead & Suburban Properties Ltd.* v. *Diomedous* [1969] Ch. 248.
[49] *Johnson* v. *Wyatt* (1863) 2 De G.J. & S. 18.
[50] *Ante*, p. 10.
[51] Replaced by Judicature Act 1925, s. 41.
[52] *Besant* v. *Wood* (1879) 12 Ch.D. 605; *Cercle Restaurant Castiglione Co.* v. *Lavery* (1881) 18 Ch.D. 555; *Re Maidstone Palace of Varieties* [1909] 2 Ch. 283.

The High Court may still restrain either the bringing of an action or the continuation of proceedings in foreign [53] or inferior English courts.[54] The jurisdiction, especially in the case of interferences with a foreign court, is exercised with great caution.[55]

Although a private prosecution will usually not be restrained,[56] a party to a pending civil action may be restrained from starting a criminal prosecution which raises substantially the same problem.[57]

It seems that the High Court may restrain the institution or continuance of proceedings before an administrative tribunal "if the subject-matter of the proceedings lies outside that tribunal's jurisdiction" [58] and "even when the proceedings lie within the jurisdiction . . .," [59] but not "if Parliament has, expressly or by implication, conferred upon the designated tribunal exclusive jurisdiction over the matters in issue." [60]

B. Injunctions to Restrain a Breach of Contract

An injunction is the appropriate remedy to restrain the breach of a negative undertaking in a contract. In some measure, it corresponds, in the area of negative undertakings, to that occupied by the remedy of specific performance in that of positive undertakings.[61] But, as will be seen,[62] the jurisdiction to grant an injunction is wider.

i. Contract Wholly Negative. Where the essence of the contractual undertaking is negative, the court will grant an injunction to restrain a breach almost as a matter of course. As Lord Cairns L.C. explained in *Doherty* v. *Allman and Dowden* [63]: "... in such case

[53] *McHenry* v. *Lewis* (1882) 22 Ch.D. 397; *Ellerman Lines* v. *Read* [1928] 2 K.B. 144; *Orr-Lewis* v. *Orr-Lewis* [1949] P. 347; *Settlement Corporation* v. *Hochschild* [1966] Ch. 10.

[54] *Re Connolly Bros Ltd.* [1911] 1 Ch. 731 (Lancaster Palatine Court); *The Teresa* (1894) 71 L.T. 342 (Liverpool Court of Passage); *Thames Launches* v. *Trinity House Corporation* (*Deptford Strond*) [1961] Ch. 197, *infra*, n. 57 (magistrates' court); *Murcutt* v. *Murcutt* [1952] P. 266 (county court).

[55] *Cohen* v. *Rothfield* [1919] 1 K.B. 410; *Orr-Lewis* v. *Orr-Lewis* [1949] P. 347; *Settlement Corporation* v. *Hochschild*, *supra*.

[56] *Corporation of York* v. *Pilkington* (1742) 2 Atk. 302; Hanbury, *The Vinerian Chair and Legal Education*, p. 73.

[57] *Thames Launches* v. *Trinity House Corporation* (*Deptford Strond*), *supra*.

[58] De Smith, *Judicial Review of Administrative Action* (2nd ed.), p. 488.

[59] *Ibid*. p. 490; this would arise if a party to the proceedings before the tribunal had already brought an action for a declaration in the High Court to secure a determination of one of the matters in issue, *ibid*. p. 491.

[60] *Ibid*. p. 491. The Arbitration Act 1950, s. 4, empowers the court to stay proceedings where there is an agreement providing for reference of matters of dispute to arbitration.

[61] *Ante*, p. 34 *et seq*.

[62] *Post*, p. 70; *Donnell* v. *Bennett* (1883) 22 Ch.D. 835.

[63] (1878) 3 App.Cas. 709 at p. 720; Tiley, p. 103; *Sefton* v. *Tophams* [1967] A.C. 50; *Hampstead & Suburban Properties Ltd.* v. *Diomedous* [1969] Ch. 248 (an interlocutory injunction).

the injunction does nothing more than give the sanction of the process of the court to that which already is the contract between the parties." It is not necessary even to prove damage,[64] except where the action is by a reversioner.[65]

> In the old case of *Martin* v. *Nutkin*,[66] an injunction was granted to restrain the ringing of a church bell, the plaintiff having put a clock in the church on the understanding that the bell should not be rung at 5 a.m.

Similarly many cases of covenants against particular types of user are restrained by injunction, whether the action is between the parties to the agreement,[67] or between persons in privity of estate,[68] or under the rule in *Tulk* v. *Moxhay*.[69]

However an injunction was refused in *Baxter* v. *Four Oaks Properties Ltd.*,[70] where the defendants, innocently, but in breach of covenant, intended to use a new building as flats. "The effect of granting such an order would . . . be to put the plaintiffs in a very strong bargaining position, for unless the defendants were prepared to leave the building unused, they would be forced to buy a release of the injunction . . . what the plaintiffs would get in the end would be damages—though, no doubt, more damages than they would get if no injunction were granted." [71]

ii. Where the Contract Contains Both Positive and Negative Terms. Where a contract contains both positive and negative stipulations, and the positive ones are not susceptible to the remedy of specific performance, the question arises whether the plaintiff can restrain the breach of the negative stipulation by injunction. In suitable cases, this can be done. The jurisdiction to grant an injunction is wider than that to order specific performance.

The difference between the availability of the remedies stems basically from the fact that there are greater practical difficulties in ensuring that a decree of specific performance is carried out. A

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[64] *Grimston* v. *Cuningham* [1894] 1 Q.B. 125; *Marco Productions Ltd.* v. *Pagola* [1945] K.B. 111, where a troupe of dancers agreed not to perform for another producer; injunction granted although the plaintiffs could not show that they would suffer greater damage if the dancers performed elsewhere than if they remained idle.

[65] *Johnstone* v. *Hall* (1856) 2 K. & J. 414.

[66] (1724) 2 P.Wms. 266.

[67] *Post*, p. 73.

[68] As where covenants made between landlord and tenant are enforceable between assigns under the rule in *Spencer's Case* (1583) 5 Co.Rep. 16a, and L.P.A. 1925, ss. 141, 142.

[69] (1848) 2 Ph. 774; *post*, p. 600.

[70] [1965] Ch. 816.

[71] *Ibid.* p. 829, *per* Cross J.

threat of imprisonment for contempt will probably be sufficient to ensure that the defendant complies. But if not, the carrying out of the threat does not effectively carry out the promised performance. With an injunction, on the other hand, the physical detention of the defendant will often ensure that he refrains from doing whatever he undertook not to do. However, there are exceptional cases where the injunction depends for its efficacy upon the threat.

The negative covenant must however be one which is genuinely negative in substance and not merely in form. It is not sufficient if it is merely a repetition in negative form of the positive stipulation.

> In *Davis* v. *Foreman*,[72] an employer had agreed with his manager not to terminate the manager's employment except for misconduct or breach of the agreement. The employer gave notice determining the agreement. It was held that he could not be restrained by injunction; for the term was in substance a positive undertaking to retain the manager in his employment.

iii. Contracts of Service. It is axiomatic that specific performance will not be given of contracts of employment.[73] Continual supervision would be necessary and the enforced performance of the contractual duties would compel the servant to act according to the orders of his master. But an injunction may issue to restrain the breach of a negative undertaking in a contract of service.

> In *Lumley* v. *Wagner*,[74] Miss Wagner, a well-known opera star, had agreed with Lumley that she would sing at Her Majesty's Theatre during a certain period, and would not sing anywhere else without his written permission. She made another engagement with Gye [75] to sing at Covent Garden and abandoned her previous commitment to Lumley, who sought an injunction to restrain her from singing for Gye. Lord St. Leonards held that an injunction should be granted to restrain the breach of the negative stipulation; it would not of course have been possible to obtain specific performance of the promise to sing.

The principle of *Lumley* v. *Wagner* [74] has been much criticised.[76]

[72] [1894] 3 Ch. 654; *Kirchner & Co.* v. *Gruban* [1909] 1 Ch. 413.
[73] *Ante*, p. 46.
[74] (1852) 1 De G.M. & G. 604.
[75] Lumley also sued Gye for inducing her to break her contract, *Lumley* v. *Gye* (1853) 2 E. & B. 216.
[76] Ames, *Lectures on Legal History*, p. 370; *per* Lindley L.J. in *Whitwood Chemical Co.* v. *Hardman* [1891] 2 Ch. 416 at p. 428; Tiley, p. 108: "I think that the court . . . will generally do much more harm by attempting to decree specific performance in cases of personal service than by leaving them alone; and whether

It is said that the issue of an injunction in this situation is the equivalent of negative specific performance; and that a number of principles are thereby disregarded, especially the rule that the court will not supervise the performance of contracts; and the principle that the contracting parties must not become tied together in a relationship involving a status of servitude. Justice Holmes [77] has spoken of the giving of an injunction and refusal of specific performance as a distinction without a difference; and the concept of personal servitude introduces constitutional as well as emotional objections in the U.S.A.[78]

On the other hand, the carrying out of agreements must be encouraged by the courts, whatever remedy is used.[79] This view is commonly followed in the case of purely negative contracts or covenants. And if a contract contains both positive and negative stipulations, it is a curious objection that the enforcement of the negative term has the effect of enforcing the positive. It is submitted that the correct approach in these situations, as in other cases of injunctions, is that the injunction should issue to restrain the breach of a negative undertaking, unless the defendant can show that the court should in its discretion refuse on the ground that undesirable consequences may follow. Each case, in other words, should be treated on its merits.

Thus a servant should not be put into a position in which he must either perform the contract or do nothing.

In *Rely-a-Bell Burglar and Fire Alarm Co.* v. *Eisler* [80] the servant had contracted to serve the employer and to take no other employment for the period of the contract of service. An

it is attempted to enforce these contracts directly by a decree of specific performance, or indirectly by an injunction, appears to me to be immaterial."

[77] *Javierre* v. *Central Altagracia*, 217 U.S. 502 at p. 508 (1910); Treitel, *The Law of Contract* (2nd ed.), p. 699, points out that it is strange that a negative covenant operating upon an employee during the continuance of his employment is treated quite differently in law from one which operates after the conclusion of the employment. This latter situation is characterised as one of restraint of trade, and such contracts are valid only if they are reasonable and not contrary to public interest. "It is submitted that it is unsatisfactory to judge negative clauses by entirely different criteria according to whether they operate during or after employment. The criterion of reasonableness should be applied in both kinds of case": p. 700; *Eastham* v. *Newcastle United F.C. Ltd.* [1964] Ch. 413; *Warner Bros.* v. *Nelson* [1937] 1 K.B. 207, 214; *Petrofina (Great Britain) Ltd.* v. *Martin* [1966] Ch. 146; *Esso Petroleum Co. Ltd.* v. *Harper's Garage (Stourport) Ltd.* [1968] A.C. 269.

[78] 6 Cornell L.Q. 235 (R. S. Stevens); 6 Col.L.R. 82 (C. D. Ashley); 17 Col.L.R. 687 (G. L. Clark); *ante*, p. 46.

[79] *Lane* v. *Newdigate* (1804) 10 Ves.Jr. 192.

[80] [1926] Ch. 609; *Ehrman* v. *Bartholomew* [1898] 1 Ch. 671; *Chapman* v. *Westerby* [1913] W.N. 277.

> injunction was refused, and damages awarded. In *Warner Bros.* v. *Nelson*,[81] a well-known actress, Bette Davis, contracted not to work as a film actress for any other film company for the period of the contract, "or to be engaged in any other occupation."

There is nothing invalid or illegal about such a contract. The rules of reasonableness which apply to restrictions upon activities after leaving the plaintiff's employment are not relevant here.[82] In this case the question is whether an injunction is an appropriate remedy. "[I]t would, of course, be impossible to grant an injunction covering all the negative covenants in the contract. That would, indeed, force the defendant to perform her contract or remain idle; but this objection is removed by the restricted form in which the injunction is sought. It is confined to forbidding the defendant, without the consent of the plaintiffs, to render any services for or in any motion picture or stage production for any one other than the plaintiffs."[83] An injunction was given on these terms.[84] Miss Davis was still free to earn a living in other ways, even if they were less lucrative. Nor can an employer be compelled to employ a servant.[85]

As explained below,[86] it is most unlikely that an injunction will be awarded in the case of personal services unless the contract contains an express negative stipulation.

iv. Where there is no Express Stipulation. Where a contract, drafted in positive form, contains no express negative stipulation, it is possible, in suitable circumstances, to discover in the contract, on its proper construction, an implied negative undertaking which can be remedied by injunction.[87] It is not possible to lay down a rule to determine the circumstances in which an injunction may be obtained. The question in each case depends upon the construction which the court places upon the particular contract.

The principle was laid down by Lord Selborne in *Wolverhampton and Walsall Railway Co. Ltd.* v. *L.N.W.Ry. Ltd.*[88] as being that the court should "look in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question

[81] [1937] 1 K.B. 209.
[82] *Ante*, p. 71, note 77.
[83] [1937] 1 K.B. at p. 219, *per* Branson J.
[84] *Robinson & Co. Ltd.* v. *Heuer* [1898] 2 Ch. 451.
[85] *Page One Records Ltd.* v. *Britton* [1968] 1 W.L.R. 157.
[86] *Post*, p. 73.
[87] *Tulk* v. *Moxhay* (1848) 2 Ph. 774; *De Mattos* v. *Gibson* (1859) 4 De G. & J. 276; *Catt* v. *Tourle* (1869) L.R. 4 Ch.App. 654; *Clegg* v. *Hands* (1890) 44 Ch.D. 503; *Jones and Sons Ltd.* v. *Tankerville* [1909] 2 Ch. 440.
[88] (1873) L.R. 16 Eq. 433 at p. 440.

will arise, whether this is the court to come to for a remedy. If it is, I cannot think that ought to depend on the use of a negative rather than an affirmative form of expression."

A negative stipulation is rarely implied in contracts of personal service. It will not be implied although the servant has contracted to devote the whole of his time to his employer [89]; nor where there was a contract to sell to a purchaser all the "get" of a colliery for five years [90]; nor where a boxer agreed that his manager should have the "sole arrangements" for his boxing and other engagements.[91]

However, in *Metropolitan Electric Supply Co.* v. *Ginder*,[92] the defendant applied for a supply of electricity on terms which provided that the defendant agreed to take all the electricity required by his premises from the plaintiff for a stated period. The plaintiff was not bound to supply, nor the defendant to take, any electricity. The contract was, however, construed as an undertaking not to take electricity from any other persons, and the defendant was restrained by injunction from doing so.

In *Manchester Ship Canal* v. *Manchester Racecourse Co.*[93] the grant of a "first refusal" was construed as an undertaking enforceable by injunction, not to sell to anyone else in contravention of the undertaking.

It is established that a similar construction may be applied to the following types of case:

(a) *Contracts Affecting the Use of Land.* A covenant which touches and concerns the land so as to be binding in equity upon successors in title to the land under the doctrine of *Tulk* v. *Moxhay* [94] will be construed as negative and subjected to an injunction if it is negative in substance although positive in form. "This condition is satisfied if the owner of the land undertakes to use the premises for private residence only, or to keep certain windows obscured, or not to. . . . But in every case it is the substance and not the form of the contract that must be regarded, for if an undertaking, though couched in affirmative terms, clearly implies a negative, it will be caught by the doctrine of *Tulk* v. *Moxhay*." [95] Indeed, in *Tulk* v. *Moxhay* itself, the covenant was to "keep and maintain the said piece of ground in its then form, and in sufficient and proper repair . . . in an open state, uncovered with any buildings in neat and ornamental order." [96]

[89] *Whitwood Chemical Co.* v. *Hardman* [1891] 2 Ch. 416; Tiley, p. 108.
[90] *Fothergill* v. *Rowland* (1873) L.R. 17 Eq. 132; Tiley, p. 112.
[91] *Mortimer* v. *Beckett* [1920] 1 Ch. 571; Tiley, p. 110.
[92] [1901] 2 Ch. 799.
[93] [1901] 2 Ch. 37.
[94] (1848) 2 Ph. 774.
[95] Cheshire, p. 540.
[96] (1848) 2 Ph. 774, 775, *post*, p. 600.

The fact that a court was powerless to interfere against third parties except by the use of an injunction no doubt encouraged the courts to extend its use of the concept.

(b) *Contractual Licences.* After a long search for the proper solution to the problem of the revocation by a licensor of a contractual licence in breach of contract, the courts have found it in the issue of an injunction to restrain the breach of contract.[97] A contractual licence is commonly in positive form—permitting the licensee to occupy premises. But where the licence on its proper construction gives no right to the licensor to revoke in the way in which he has purported to do, the court will treat the matter as one in which, on the proper construction of the contract, the licensor has contracted not to revoke inconsistently with the terms of the licence, and will restrain him from doing so.

> In *Jones (James) and Sons Ltd.* v. *Earl of Tankerville*,[98] the plaintiff was entitled under contract to enter the defendant's land to cut and take away timber. This could have been regarded as a contract to grant a profit à prendre, and specifically enforceable. Parker J. preferred to construe it as a contract to sell future cut timber, and granted an injunction to restrain the defendant from interfering with the plaintiff in enjoying his rights under the contract.

C. Injunction to Restrain a Breach of Trust or Other Equitable Obligation

There are many examples of the issue of an injunction to restrain a breach of an equitable obligation, and a few must suffice here. Trustees have been restrained from distributing an estate inconsistently with the terms of the instrument[99]; and from electing as minister to a Presbyterian chapel a person not licensed as a preacher in the Church of Scotland[1]; or from selling under depreciatory conditions of sale[2]; or from selling for a price below that offered firmly by a prospective purchaser[3]; or selling as tenant for life inconsistently with the tenant for life's position as trustee.[4] An injunction has been

97 *Wood* v. *Leadbitter* (1845) 13 M. & W. 838; *Hurst* v. *Picture Theatres Ltd.* [1915] 1 K.B. 1; *Winter Garden Theatre (London) Ltd.* v. *Millennium Productions Ltd.* [1946] 1 All E.R. 678; [1948] A.C. 173; *cf. Thompson* v. *Park* [1944] K.B. 408; (1948) 64 L.Q.R. 57 (H. W. R. Wade); Maudsley and Burn, *Land Law: Cases and Materials*, p. 274 *et seq.*

98 [1909] 2 Ch. 440.

99 *Fox* v. *Fox* (1870) L.R. 11 Eq. 142.

1 *Milligan* v. *Mitchell* (1833) 1 Myl. & K. 446.

2 *Dance* v. *Goldingham* (1873) L.R. 8 Ch.App. 902.

3 *Buttle* v. *Saunders* [1950] 2 All E.R. 193 (*post*, p. 312), where the trustee had promised (but not in binding form) to sell land to another purchaser.

4 *Wheelwright* v. *Walker* (1883) 23 Ch.D. 752.

granted to restrain a bankrupt executor from acting [5]; to restrain the publication by students of the unpublished lectures of a university professor [6]; and at the instance of a shareholder to restrain a company from disposing of an exceptionally large sum for the benefit of employees.[7]

D. Injunction to Restrain the Commission or Continuance of a Tort

In each of the many cases in which an injunction issues to restrain the commission of a tort, equity is exercising its "concurrent" jurisdiction. Equity plays no part in determining whether a wrong has been committed; that is a matter solely of law. It is the remedy alone that is equitable. Thus the plaintiff must first establish the commission or threat of something which constitutes a tort at law. It is not within the province of this book to consider what is thus included. The point here is that there can be no injunction under the jurisdiction at present under discussion unless the plaintiff can establish that the act is a tort. If it is, the court may, in its discretion, grant an injunction. The rules and practice vary with the tort in question.[8]

i. Nuisance. The act complained of must constitute a nuisance at law. "There is no such thing as an equitable nuisance." [9] The interference must be sufficient to give rise to a claim for damages.[10] No injunction will issue to deal with a trifling interference [11]; and even if damage is proved, equity will not grant an injunction in every case in which common law would award damages. The remedy is discretionary.

ii. Trespass. An injunction will issue to restrain a threatened or existing trespass. In minor cases, the court will leave the plaintiff to such remedy as he has at law; as where a clergyman of the Church of England held services on the sea shore between high and low water mark which was leased by the Crown to the Corporation [12]; or where collectors chased a butterfly on to the plaintiff's land.[13] Where, however, the defendant entered the plaintiff's wood, cut down trees and clearly intended to cut more, he was restrained.[14]

[5] *Bowen* v. *Phillips* [1897] 1 Ch. 174.
[6] *Caird* v. *Sime* (1887) 12 App.Cas. 326.
[7] *Parke* v. *Daily News* [1961] 1 W.L.R. 493.
[8] Previous editions have dealt with other matters such as copyright, patents, trade marks, and passing off, but these have been omitted on the ground of lack of space.
[9] *Per* Kindersley V.-C. in *Soltau* v. *de Held* (1851) 2 Sim.(N.S.) 133 at p. 151.
[10] Or show that such was threatened.
[11] *Ankerson* v. *Connelly* [1907] 1 Ch. 678.
[12] *Llandudno Urban Council* v. *Woods* [1899] 2 Ch. 705.
[13] *Fielden* v. *Cox* (1906) 22 T.L.R. 411; *Behrens* v. *Richards* [1905] 2 Ch. 614.
[14] *Stanford* v. *Hurlstone* (1873) L.R. 9 Ch.App. 116.

> A mandatory injunction will be granted where necessary. In *Kelsen* v. *Imperial Tobacco Co.*[15] an advertising sign erected by the defendants constituted a trespass by projecting into the air-space above the plaintiff's single-storey shop. No harm was done to the plaintiff. McNair J.[16] granted a mandatory injunction ordering the removal of the advertisement.

And in *Canadian Pacific Railway* v. *Gaud*[17] a discharged crew was ordered to leave the ship.

iii. Libel. Before 1854 an injunction to restrain the publication of a libel was unthinkable either at law or in equity; at law, because prior to the Common Law Procedure Act 1854, courts of law could not grant injunctions at all; and in equity, because prior to the Judicature Act 1873, cases of libel could not come before courts of equity.[18] As late as 1875, in *Prudential Assurance Co.* v. *Knott*,[19] it was decided that the court had no jurisdiction to restrain the publication of a libel as such, even if injurious to property. But in *Quartz Hill Consolidated Gold Mining Co.* v. *Beall*[20] the jurisdiction was positively asserted by Jessel M.R. An interlocutory injunction is required to restrain the publication, and Jessel M.R. was careful to point out the need for great caution in its exercise. An interlocutory injunction will only be granted to restrain publication if the plaintiff can satisfy the court of the falsity of the statements, and furthermore, where they are privileged, of the presence of malice. In *Bonnard* v. *Perryman*[21] it was laid down as a working rule that an interlocutory injunction ought never to be granted except in the clearest cases, in which, if a jury did not find the matter complained of to be libellous, the court would set aside the verdict as unreasonable.[22] The question whether this ought to be considered an absolute rule of practice divided the Court of Appeal in *Monson* v. *Tussauds*,[23] where the Queen's Bench Division had come to the conclusion that the case was one of libel beyond all question, and therefore an interlocutory injunction ought to be granted. But the Court of Appeal refused it, as it appeared from further affidavits filed that there would

15 [1957] 2 Q.B. 334.
16 Following the "classic statement" of A. L. Smith L.J. in *Shelfer* v. *City of London Electric Lighting Co.* [1895] 1 Ch. 287, 322.
17 [1949] 2 K.B. 239.
18 *Bonnard* v. *Perryman* [1891] 2 Ch. 269.
19 (1875) L.R. 10 Ch.App. 142.
20 (1882) 20 Ch.D. 501.
21 [1891] 2 Ch. 269. See also *Hermann Loog* v. *Bean* (1884) 26 Ch.D. 306; *ante*, p. 63.
22 Following Lord Esher in *Coulson* v. *Coulson* (1887) 3 T.L.R. 846.
23 [1894] 1 Q.B. 671.

be a question at the trial whether the plaintiff had agreed to the publication.[24]

E. Public Wrongs

Although an injunction normally issues to prevent a breach of the plaintiff's own rights, it is available, at the suit of the Attorney-General, to restrain an act which is illegal or detrimental to the public. Thus the Attorney-General may obtain an injunction to restrain a public nuisance, either on his own initiative, or on the relation of some other person such as a local authority.[25] A private individual may only sue in respect of public nuisances where a private right of his own is interfered with,[26] or where he suffers special damage peculiar to himself from the interference of the public right.[27]

It may be necessary to issue an injunction to restrain a *public* nuisance where damages would have been an adequate remedy if the act had constituted merely a *private* nuisance.[28]

An injunction may issue in circumstances where it is the only effective way of protecting the interests of the public, or where the criminal penalty has proved inadequate to prevent continuous breaches of the law. Injunctions were issued where the defendant ran buses in Manchester without licence and in defiance of the corporation's objections, the profits being greater than the fines[29]; and where the defendant used his land as a caravan site in defiance of an enforcement notice under the Town and Country Planning legislation.[30] The court has a broad discretion in these matters. There is reluctance to grant an injunction, with the threat of imprisonment for contempt in the case of disobedience[31]; on the other hand it is important in the interests of the public that the respect for the law should be maintained.[32]

F. Injunctions in Family Matters

The Court has a statutory jurisdiction to grant injunctions to restrain a husband from dealing with property so as to defeat his

[24] The plaintiff, who had been tried in Scotland for murder, where the jury had returned a verdict of "not proven," complained of the exhibition of a figure of himself in a room next to the "Chamber of Horrors."
[25] *Att.-Gen.* v. *Logan* [1891] 2 Q.B. 100.
[26] *Lyon* v. *Fishmongers Co.* (1876) 1 App.Cas. 662.
[27] *Winterbottom* v. *Lord Derby* (1867) L.R. 2 Ex. 316 at pp. 320, 322; *Benjamin* v. *Storr* (1874) L.R. 9 C.P. 400.
[28] *Att.-Gen.* v. *P.Y.A. Quarries* [1957] 2 Q.B. 169.
[29] *Att.-Gen.* v. *Sharp* [1931] 1 Ch. 121; *Att.-Gen.* v. *Harris* [1961] 1 Q.B. 74; Tiley, p. 104 (selling flowers illegally from stalls).
[30] *Att.-Gen.* v. *Bastow* [1957] 1 Q.B. 514; *Att.-Gen.* v. *Smith* [1958] 2 Q.B. 173.
[31] As happened in *Att.-Gen* v. *Harris* (*supra*).
[32] *Att.-Gen.* v. *Harris*, *supra*, at p. 91, *per* Sellers L.J.

wife's claim to maintenance.[33] Injunctions are commonly granted in relation to occupation of the matrimonial home.[33a] Although such disputes will frequently now be dealt with under the provisions of the Matrimonial Homes Act 1967, the Court may still grant an injunction under its inherent powers to fill gaps in that legislation.[33b] The Court will only grant an injunction when it is necessary to protect the applicant's person or property.[34] Thus the Courts have enjoined a husband from installing his mistress in the matrimonial home,[34a] and injunctions will be granted to prevent a husband evicting his wife from the matrimonial home, unless he provides suitable alternative accommodation or maintenance.[34b] But the jurisdiction is sparingly exercised. It will however be freely used to prevent molestation [35] (particularly if the children of the marriage are threatened) and oppression of the parties pending suit.[35a]

The remedy of injunction is also employed in the protection of infants; for example, to restrain a wife from passing on to a child a letter which she had written,[36] or to restrain persons who had enticed a girl of sixteen away from her father, from continuing to harbour her.[37] It is in connection with equity's special care concerning infants that most risks are taken with regard to the issue of injunctions against persons outside the jurisdiction.[38]

G. Restraint of Legislative Proposals

It is unlikely that the validity of an Act of Parliament can be challenged in the courts,[39] and it is very doubtful whether an injunction will lie to restrain the introduction or enactment of a Bill, for any such interference by the courts would encroach upon the exclusive province of Parliament.[40] Certainly no injunction will lie to restrain

[33] Matrimonial Causes Act 1965, s. 32.

[33a] *Symonds* v. *Hallett* (1883) 24 Ch.D. 346; *Shipman* v. *Shipman* [1924] 2 Ch. 140; *Boyt* v. *Boyt* [1948] 2 All E.R. 436; *Teakle* v. *Teakle* (1950) 66 T.L.R. (Pt. 2) 588; *Cook* v. *Cook* [1964] P. 220; *Montgomery* v. *Montgomery* [1965] P. 46; *Nanda* v. *Nanda* [1968] P. 351; *Garasz* v. *Garasz, The Times*, July 10, 1969.

[33b] *Maynard* v. *Maynard* [1969] 2 W.L.R. 22.

[34] *Des Salles d'Epinoix* v. *Des Salles d'Epinoix* [1967] 1 W.L.R. 553.

[34a] *Pinckney* v. *Pinckney* [1966] 1 All E.R. 121.

[34b] *Lee* v. *Lee* [1952] 2 Q.B. 489. Since the Matrimonial Homes Act 1967, the wife may have extensive rights under the Act.

[35] *Nanda* v. *Nanda* [1968] P. 351.

[35a] *Pinckney* v. *Pinckney, supra.*

[36] *R.* v. *R. & I.* [1961] 1 W.L.R. 1334.

[37] *Lough* v. *Ward* [1945] 2 All E.R. 338.

[38] *Re Liddell's S.T.* [1936] Ch. 365; *Harben* v. *Harben* [1957] 1 W.L.R. 261; see also *Re O.* [1962] 2 All E.R. 10.

[39] But there is much academic speculation which revolves around the extent and character of the sovereignty of Parliament as a law-making authority, as to which see works on constitutional law.

[40] Bill of Rights 1688, s. 1, art. 9.

any procedure concerning a Public Bill.[41] But the courts have repeatedly affirmed that an injunction may issue to restrain the breach of contractual obligations not to promote or to petition against a Private Bill.[42] Yet no injunction so granted has ever been upheld on appeal.[43] The supposed jurisdiction rests on a false analogy with the former right to award a common injunction to prevent a litigant from making an inequitable use of a legal right that the common law courts were bound to enforce, but Parliament's primary function is to legislate regardless of vested rights, and it should not be impeded by contractual undertakings.[44] Agreements of this kind have in any case been condemned by the House of Commons as improper, and it seems most unlikely that an injunction would ever now be granted to restrain breach of such a contract. But an injunction may be granted to the Attorney-General to restrain unauthorised expenditure of public funds in promoting or opposing a Private Bill,[46] and this might in practice prevent the petitioner from continuing with his application to Parliament.

It seems to be very unlikely that an injunction will lie to restrain the making of a subordinate legislative instrument, though the possibility has been left open by the courts.[47]

H. Trade Unions and Clubs

Some use of the injunction has been made as a remedy against trade unions. The Trade Union Act 1871, s. 4, bars the courts from entertaining proceedings which have the object of directly enforcing or recovering damages for the breach of certain agreements made by trade unions,[48] and it has been held that a claim for an injunction by

[41] See, *e.g.*, de Smith, *Judicial Review of Administrative Action* (2nd ed.), p. 481 *et seq.* The Privy Council approved the grant of an injunction to restrain the submission of a New South Wales Bill for the Royal Assent in *Att.-Gen. for New South Wales* v. *Trethowan* [1932] A.C. 526, where the Bill which was designed to abolish the Legislative Council (Upper House) had not first been submitted to a referendum of the electors, as required by the New South Wales Constitution Act 1902, s. 7A. But the decision was expressly based on the ground that the New South Wales Parliament was a subordinate legislature. Dixon C.J., in the later case of *Hughes & Vale Pty. Ltd.* v. *Gair* (1954) 90 C.L.R. 203 at p. 204, anyway doubted the correctness of the decision in *Trethowan's* case, pointing out that the question whether an injunction could have been properly issued had been excluded from the permitted grounds of appeal, which were concerned only with the constitutionality of the Bill.

[42] See *Bilston Corporation* v. *Wolverhampton Corporation* [1942] Ch. 391.

[43] See Erskine May, *Parliamentary Practice* (17th ed.), p. 870; (1943) 59 L.Q.R. 2 (Sir William Holdsworth).

[44] de Smith, *loc. cit.*; Holdsworth, *loc. cit.*

[46] *Att.-Gen.* v. *London & Home Counties Joint Electricity Authority* [1929] 1 Ch. 513.

[47] *Harper* v. *Secretary of State for Home Affairs* [1955] Ch. 238, where an attempt to restrain the Secretary of State from presenting a draft order to Her Majesty in Council failed, mainly on the ground that the order was *intra vires*.

[48] For a fuller discussion, see *e.g.*, Cooper, *Outlines of Industrial Law* (5th ed.), Chap. XI.

a member against his union to restrain it from excluding him from benefits prescribed by its rules was a claim for direct enforcement of an agreement to provide benefits for members, and so prohibited by the section.[49] On the other hand an injunction has been granted to restrain the officials of a union from applying funds in a manner contrary to an agreement to provide benefits for members.[50] Perhaps the most important use of the injunction in this field has been to restrain the expulsion of a member by his union where such expulsion is contrary to the rules of the union.[51] But as the right of a member to invoke the assistance of the courts in resisting expulsion is essentially a contractual right,[52] the subject-matter of the implied contract being the property of the association, it follows that where an association has no property the right of membership is not a legal right. Equity will not compel persons to remain in continual and personal relations with one another,[53] and so membership will not be protected by injunction unless some other reason than the mere pre-existing membership can be found by the applicant.[54]

Injunctions have also been granted to professional men who have been dismissed contrary to the rules of their profession, though usually only where improper motive or bad faith can be shown,[55] and to members expelled by social clubs. In the latter case, however, the courts seem prepared to interfere not only where rules have been broken, but also where a club has acted in breach of natural justice. Thus, in *Labouchere* v. *Earl of Wharncliffe*,[56] the general meeting of a club, summoned without proper notice, expelled the

[49] *Rigby* v. *Connol* (1880) 14 Ch.D. 482; *Duke* v. *Littleboy* (1880) 49 L.J.Ch. 802; In *Torquay Hotel Co. Ltd.* v. *Cousins* [1969] 2 W.L.R. 289, the Court of Appeal held also that the Trade Disputes Act 1906, s. 4 (1), prohibits not only an action against a trade union for damages for a tort, but also an action for an injunction (including a *quia timet* injunction) in respect of a tort. But there is no reason to suppose that an injunction cannot be granted against a trade union to restrain a breach of contract, subject only to the exclusion of some types of contract expressly dealt with in Trade Union Act 1871, s. 4.

[50] *Wolfe* v. *Matthews* (1882) 21 Ch.D. 194; *Yorkshire Miners' Association* v. *Howden* [1905] A.C. 256.

[51] See *Osborne* v. *Amalgamated Society of Railway Servants* [1911] 1 Ch. 540; *Amalgamated Society of Carpenters* v. *Braithwaite* [1922] 2 A.C. 440. The plaintiff should normally, however, exhaust other remedies available to him under the rules before the court will entertain his application: *White* v. *Kuzych* [1951] A.C. 585; but *cf. Lawlor* v. *Union of Post Office Workers* [1965] Ch. 712 (it would have been unreasonable in point of time to expect the plaintiff to exhaust the internal union appeal machinery first).

[52] *White* v. *Kuzych*, *supra*; *Bonsor* v. *Musicians' Union* [1956] A.C. 104.

[53] *Lumley* v. *Wagner* (1852) 1 De G.M. & G. 604; *cf. Rigby* v. *Connol*, *supra*, at pp. 487, 488, *per* Jessel M.R.

[54] *Baird* v. *Wells* (1890) 44 Ch.D. 661.

[55] *Hayman* v. *Governors of Rugby School* (1874) 18 Eq. 28; *Cassel* v. *Inglis* [1916] 2 Ch. 211; *Weinberger* v. *Inglis* [1919] A.C. 606; Lloyd, *Law of Unincorporated Associations*, p. 126.

[56] (1879) 13 Ch.D. 346; and see *Harington* v. *Sendall* [1903] 1 Ch. 921; *cf. Dawkins* v. *Antrobus* (1881) 17 Ch.D. 615.

plaintiff without full inquiry, without giving him notice of any definite charge, and by a resolution carried by an insufficient majority, and the court granted an injunction against such purported expulsion.

I. Injunctions and Declarations

The action for a declaration is today commonly used as a remedy in public law, either in addition or as an alternative to the injunction. Although having some connection with equity in origin,[57] the jurisdiction to grant a declaration is now governed wholly by statute, so that it is doubtful whether the declaration can be considered as an equitable remedy. Rules regulating the practice and procedure in relation to the declaration have been made by the Supreme Court Rules Committee.[58] An applicant for a declaration is primarily asking the court to declare the legal position concerning a matter in dispute, so that the remedy, if granted, is not in itself an order of the court, and is thus non-coercive. Applicants do, however, frequently apply for an injunction as well as a declaration, so that the relief obtained is, so far as the injunction is concerned, enforceable.

A modern example of the use of injunction and declaration together is provided by *Hiles* v. *Amalgamated Society of Woodworkers*,[59] in which the plaintiff, who was a member of the defendant union, had been summoned to appear before a district management committee of the union to answer a charge that he had issued a circular in breach of union rules. At the hearing the charge was dismissed, but subsequently, without his knowledge, an appeal was lodged with the union's executive council, who upheld the appeal and ordered the plaintiff's dismissal from the union. The plaintiff then brought proceedings for a declaration that the decision of the council was invalid, and moved for an interim injunction restraining the defendants from acting upon it. Stamp J. held that, on a true construction of the union rules, the proceedings before the executive council were a nullity, because no appeal could be brought against the dismissal of a charge; and that, even if this were wrong, the proceedings were clearly contrary to natural justice. He therefore granted the interim injunction.

[57] See de Smith, *Judicial Review of Administrative Action* (2nd ed.), pp. 491–501; *cf.* Snell, p. 637.
[58] Now R.S.C., Ord. 15, r. 16.
[59] [1968] Ch. 440.

PART III

TRUSTS AND POWERS

CHAPTER 4

NATURE AND CLASSIFICATION OF TRUSTS

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1. DISTINCTIONS

MANY attempts have been made to define a trust, but none of them has been wholly successful.[1] It is not thought that a dissection and criticism of earlier definitions are very rewarding; rather it is better to describe than to define a trust, and then to distinguish it from related but distinguishable concepts.

A trust is a relationship recognised by equity which arises where property is vested in (a person or) persons called the trustees, which those trustees are obliged to hold for the benefit of other persons called *cestuis que trust*[2] or beneficiaries. The interests of the beneficiaries will usually be laid down in the instrument creating the trust, but may be implied or imposed by law.[3] The beneficiaries' interest is proprietary[4] in the sense that it can be bought and sold,

[1] Co.Litt. 272b; Underhill, *Law of Trusts and Trustees* (11th ed.), p. 3 used by Cohen J. in *Re Marshall's W.T.* [1945] Ch. 217 at p. 219 and by Romer L.J. in *Green* v. *Russell* [1959] 2 Q.B. 226 at p. 241; Lewin, *Practical Treatise on Law of Trusts* (16th ed.), p. 1; Keeton, *Law of Trusts* (9th ed.), p. 2; Snell, p. 97; *Halsbury's Laws of England* (3rd ed.), Vol. 38, pp. 809–810; *Restatement of Trusts* (U.S.A.), para. 2; Scott, *Law of Trusts*, para. 2.

[2] This is the correct plural; (1910) 26 L.Q.R. 196 (C. Sweet).

[3] *Post*, pp. 100–102.

[4] Discretionary trusts and trusts for persons for particular purposes need separate consideration: *post*, pp. 180, 195.

given away or disposed of by will; but it will cease to exist if the legal estate in the property comes into the hands of a bona fide purchaser for value without notice of the beneficial interest.[5] The subject-matter of the trust must be some form of property. Commonly, it is legal ownership of land or of invested funds; but it may be of any sort of property—land, money, chattels, equitable interests,[6] choses in action,[7] etc. There may also be trusts where there are no ascertainable beneficiaries. There is no difficulty where such trusts are for charitable purposes; such trusts are enforced at the suit of the Attorney-General.[8] But there is much doubt and uncertainty as to the status and validity of trusts for non-charitable purposes—as a trust for the building of a monument [9] or for the maintenance of the testator's horses, dogs and cats.[10]

A trust must be distinguished from certain other legal phenomena which resemble the trust, but which must be kept separate from it.

A. Bailment

Blackstone defined bailment as "a delivery of goods in trust." [11] This is a fruitful source of confusion. Bailment is a relationship recognised by the common law, and arises where a chattel, owned by A is, with A's permission, in the possession of B.[12] It may exist in different forms, the details of which are not relevant here.[13] The rights of the parties may or may not be governed by a contract. In a sense, the bailor, A, is relying on B; he expects, and is entitled to, a certain standard of care by B in his stewardship of A's chattel. But this is very different from a trust. For there is no transfer of ownership from A to B; B's duties are dependent on the rules of common law and not upon equity; and these duties are entirely different from, and minimal in character as compared with, those which would exist if B held the property as trustee for A. Again the bailor A, could lose his legal ownership only through one of the ways in which legal owners may be deprived.[14] But if the property was held by B on trust for A, A's equitable title could be defeated

5 *Pilcher* v. *Rawlins* (1872) L.R. 7 Ch.App. 259; Tiley, p. 29; *ante*, p. 21.
6 For example, where a beneficiary under a settlement makes a settlement of his beneficial interest.
7 For example, a trust of a promise, or of a debt, or of a bank balance.
8 *Post*, p. 252.
9 *Mussett* v. *Bingle* [1876] W.N. 170; *Re Endacott* [1960] Ch. 232; Nathan & Marshall, No. 28; *post*, p. 197.
10 *Pettingall* v. *Pettingall* (1842) 11 L.J.Ch. 176; *Re Dean* (1889) 41 Ch.D. 552; *post*, p. 197.
11 Bl.Com. II, p. 451; Maitland, p. 45.
12 Crossley Vaines, *Personal Property* (4th ed.), Chap. 6.
13 *Ibid.*; and see *Coggs* v. *Barnard* (1703) 2 Ld.Ray. 909.
14 *e.g.*, through estoppel, or the operation of the Factors Act 1889, ss. 2, 8, 9; Sale of Goods Act 1893, ss. 22–25; or the Hire-Purchase Act 1964, Part III.

by the transfer of the legal title in the property to a bona fide purchaser for value without notice of the trust.[15]

B. Agency

In many ways the relationship of principal and agent resembles that of beneficiary and trustee.[16] Agents, like trustees, must act personally in the business of the agency,[17] and are accountable to their principals, as are trustees to beneficiaries, for any profits made out of the property or business entrusted to them.[18] The relationship in each case is a fiduciary relationship. But the vital difference is that a trust is proprietary. The beneficiary is equitable and beneficial owner of the property. Where money is due on an account between principal and agent, it is recoverable on the basis of a personal claim.

A right to claim £100 against a defendant may be just as good as beneficial ownership of £100 in the hands of the defendant as trustee; so long as the defendant can pay. But if the defendant is insolvent, the distinction becomes clear. The personal claim is one against the general assets of the defendant; and will abate with the claims of other creditors if the defendant cannot pay in full. However, if the claim is a proprietary one, the property held by the defendant as trustee is not available for the trustee's debts. It may be claimed by the beneficiary as his own if it is identifiable; and, for the purposes of identification, a "tracing remedy"[19] is available where the assets have been mixed with the trustee's own funds. "Equity," as Maitland said, "has been always striving to prevent the *cestui que trust* from falling to the level of an unsecured creditor."[20] On the other hand, property for which the agent is liable to account to his principal is subject only to a personal claim; the principal is not owner at law or in equity of the money due, and the tracing remedy is not available.[21] Further, there is usually a contractual relationship between a principal and agent, but not between a trustee and beneficiary. And many of the rules governing principal and agent are based on the common law; the trust relationship is exclusively equitable.

[15] *Ante*, pp. 21, 86.
[16] See Hanbury, *Principles of Agency* (2nd ed.), pp. 3–10; Bowstead, *Agency* (13th ed.), p. 6.
[17] *Post*, p. 346.
[18] *Post*, p. 370.
[19] *Re Hallett's Estate* (1880) 13 Ch.D. 696, *post*, p. 419.
[20] Maitland, p. 220.
[21] *Lister* v. *Stubbs* (1890) 45 Ch.D. 1, *post*, p. 424.

C. Contract

Trust and contract are quite different concepts. A contract is a common law personal obligation resulting from agreement between the parties. A trust is an equitable proprietary relation which can arise independently of agreement. However, a trust may arise as the result of an agreement for consideration, in which case there may be both a trust and a contract.[22]

Much of the discussion on the question of distinguishing trusts from contracts has centred on the problem of the introduction of the so-called "trust concept" as a way of permitting a third party to enforce a contract entered into by others for his benefit.[23] It is submitted that this problem is not one of distinguishing trust from contract. It is a situation where, by reason of the rules of privity, the third party cannot enforce the contract. The question is whether there is a trust of the promise. The answer to that question depends, in accordance with the rule relating to the creation of express trusts, on whether there is a manifestation of an intention to create a trust of the promise; this question is discussed elsewhere.[24]

D. Debt

A debt may or may not be contractual. Whether the obligation is contractual or not, the duty of the debtor is to pay money to the creditor; that of a trustee is to hold the trust property on trust for the beneficiary. The debtor's obligation, like that of the agent, is personal. The trust is proprietary. We have seen that the distinction becomes crucial if the obligor is insolvent; and what has been said in relation to the insolvency of an agent as opposed to a trustee is relevant here also.[25]

On the other hand, it may be to a person's own advantage to be a trustee rather than a person subject to a personal obligation. If money is borrowed and then stolen from the borrower, it must still be repaid[26]; but a trustee is not liable for accidental loss.[27] Similarly, where a testator attaches obligations to a legacy, they must be complied with in full if they are personal obligations,[28] but only to the extent of the property available if the obligations are subject to

22 See *Quistclose Investments Ltd.* v. *Rolls Razor Ltd.* [1968] 3 W.L.R. 1097.
23 *Post*, p. 631.
24 *Post*, pp. 634–635.
25 *Ante*, p. 87.
26 *Shoemaker* v. *Hinze* (1881) 53 Wis. 116; 10 N.W. 86.
27 *Morley* v. *Morley* (1678) 2 Ch.Cas. 2.
28 *Rees* v. *Engelback* (1871) L.R. 12 Eq. 225; *Re McMahon* [1901] 1 I.R. 489; *Duffy* v. *Duffy* [1920] 1 I.R. 122; *Re Lester* [1942] Ch. 324; Nathan & Marshall, No. 15.

a trust or charge.[29] Sometimes a form of words is construed as creating both forms of obligation.[30] There is no reason why a debt and a trust cannot co-exist; a loan to be held by the borrower on trust is repayable if the purpose for which the money was lent is carried out, and may be held in trust for the lender if performance is impossible.[31]

E. Conditions and Charges

It is sometimes difficult to determine whether a gift of property is subject to a trust or whether it is conditional upon, or charged with, the duty of making certain payments. Thus a bequest to X "but he is to pay £50 to Y" could give rise to several possible constructions, each of them having different consequences.

The bequest could be construed as a gift to X upon trust to pay Y £50.[32] Y would immediately become entitled in equity to the payment of £50, provided that the property bequeathed was of sufficient value; a trustee is not required to produce money of his own to make up deficiencies in the trust property.[33] If the property is worth more than £50, a further question arises whether X is entitled to keep the surplus.[34] Similarly with a loan for a specified purpose which, for some reason, cannot be carried out.[35] Generally a trustee is not entitled to obtain any benefit from the trust; if, on its proper construction the trust attaches to the whole of the property, the surplus is held upon a resulting trust.[36] But a possible construction is that X was intended to take the surplus beneficially, the trust being applicable only to the £50.[37]

The bequest could also be construed as a gift to X conditional upon his performing the obligation. In that situation, Y obtains no interest in the £50; X has the choice of keeping the property and paying £50 or of declining both.[34]

[29] *Re Cowley* (1885) 53 L.T. 494.
[30] *Welby* v. *Rockcliffe* (1830) 1 Russ. & M. 571; *Wright* v. *Wilkin* (1862) 2 B. and S. 232, 260.
[31] *Quistclose Investments Ltd.* v. *Rolls Razor Ltd.* [1968] 3 W.L.R. 1097; *post*, p. 90; *Selangor United Rubber Estates* v. *Cradock* (*No.* 3) [1968] 1 W.L.R. 1555.
[32] *Re Frame* [1939] Ch. 700; Nathan & Marshall, No. 12.
[33] *Re Cowley* (1885) 53 L.T. 494.
[34] *Att.-Gen.* v. *The Cordwainers Co.* (1833) 3 Myl. & K. 534; Nathan & Marshall, No. 11; *Re Brace* [1954] 2 All E.R. 354.
[35] *Toovey* v. *Milne* (1819) 2 B. & A. 683; *Edwards* v. *Glyn* (1859) 2 E. & E. 29; *Re Rogers* (1891) 8 Morr. 243; *Quistclose Investments Ltd.* v. *Rolls Razor Ltd.*, *supra*.
[36] *King* v. *Denison* (1813) 1 V. & B. 260, *per* Lord Eldon at p. 272; *cf. Croome* v. *Croome* (1888) 59 L.T. 582; *Re West, George* v. *Grose* [1900] 1 Ch. 84; Nathan & Marshall, No. 14; *Re Rees' W.T.* [1950] Ch. 204; *post*, p. 209.
[37] *Att.-Gen.* v. *The Cordwainers Co.*, *supra*; *Re Oliver* (1890) 62 L.T. 533; Nathan & Marshall, No. 13; *Re Foord* [1922] 2 Ch. 519.

It could also be construed so as to impose a charge on the property.[38] Here again, X will only be obliged to make the payment if he receives the property and his obligation will be limited to the value of the property.[39] Y will have an equitable right by virtue of the charge[40]; but this right is a different one from that of a beneficiary under a trust.

Again, it could be construed as imposing merely a personal obligation on X if he accepts the gift. The position then is similar to one in which X is a debtor for the sum in question and this is discussed above.[41]

The difficulties of construction in cases of this type are well illustrated by *Quistclose Investments Ltd.* v. *Rolls Razor Ltd.*[42]

> Rolls Razor Ltd., very much indebted to Barclays Bank, was in need of £209,719 8s. 6d. to pay dividends previously declared on its shares. This sum was borrowed from Quistclose under an arrangement whereby the loan was to be used only for that purpose. The money was paid into a separate account at Barclays Bank, the Bank having notice of the nature of the arrangement.
>
> Before the dividend was paid, Rolls Razor went into liquidation. The question was whether the money in the account was owned beneficially by Rolls Razor in which case Barclays Bank claimed to set it off against the overdraft[43]; or whether Rolls Razor had received the money as trustees and still held it as such on trust for Quistclose.
>
> The House of Lords unanimously decided that the money had been received upon trust to apply it for the payment of dividends; that purpose having failed, the money was held on trust for Quistclose. The fact that the transaction was a loan, recoverable by an action at law, did not exclude the implication of a trust. The legal and equitable rights and remedies could co-exist. The Bank, having notice of the trust, could not retain the money against Quistclose.

F. Interest under a Will or Intestacy

The relationship between a personal representative and a legatee or devisee bears many similarities to that of trustee and beneficiary. The origins of the relationship, however, are quite distinct, the

38 *Re Oliver*, *supra*.
39 *Re Cowley*, *supra*.
40 *Parker* v. *Judkin* [1931] 1 Ch. 475.
41 *Ante*, p. 88.
42 [1968] 3 W.L.R. 1097.
43 *Rolls Razor Ltd.* v. *Cox* [1967] 1 Q.B. 552.

former originating in the Ecclesiastical Court and the latter in Chancery.[44] Although the two relationships often coalesce or overlap, there are important distinctions between them. They can be regarded from two aspects:

i. Whether a Personal Representative is a Trustee. The definition of trustee in the Trustee Act 1925 includes a personal representative [45] where the context so admits; and the Trustee Act 1925, except where otherwise expressly provided applies to executorships and administratorships [46]; and a personal representative is sometimes treated in Administration of Estates Act 1925 as a trustee.[47] A personal representative is under fiduciary duties which are very similar to those of a trustee. There are, however, a number of ways in which a personal representative has been held not to be a trustee:

(a) *Different Periods of Limitation Apply.* Generally, an action for the recovery of trust property or for a breach of trust must be brought against a trustee within six years.[48] An action against a personal representative in respect of a claim to personal estate must be brought within twelve years,[49] and an action for the recovery of arrears of interest on legacies within six years.[50]

(b) *Power of Disposition of Personalty.* The power of personal representatives to dispose of pure personalty is *several*; that of trustees is *joint*.[51] This means that one of several executors can pass title to a chattel; trustees must all combine. There is no distinction with regard to realty,[52] the power being joint in both cases.[53] Where however there is only a single personal representative, he may give a receipt for capital money arising on the sale,[54] while at least two trustees or a trust corporation are required in the case of a conveyance by a tenant for life or trustees for sale.[55]

(c) *Tenure of Office.* A personal representative holds his office for life,[56] unless the grant was for a limited period or he is released

[44] *Post*, p. 436.
[45] s. 68 (17).
[46] s. 69.
[47] A.E.A. 1925, ss. 33, 46, 49; Intestates' Estates Act 1952.
[48] Limitation Act 1939, s. 19 (2); there is an exception for fraud, and in respect of property retained by a trustee.
[49] Limitation Act 1939, s. 20; *Ministry of Health* v. *Simpson* [1951] A.C. 251; Tiley, p. 349, affirming *sub. nom. Re Diplock* [1948] Ch. 465.
[50] Limitation Act 1939, s. 20.
[51] *Jacomb* v. *Harwood* (1751) 2 Ves.Sen. 265; *Attenborough* v. *Solomon* [1913] A.C. 76; Nathan & Marshall, No. 52.
[52] Including leaseholds after 1925; A.E.A. 1925, s. 3 (1).
[53] *Ibid.* s. 2 (2).
[54] L.P.A. 1925, s. 27 (2), as amended by L.P. (A.) A. 1926.
[55] T.A. 1925, s. 14; *post*, p. 344.
[56] *Attenborough* v. *Solomon*, *supra*; *Harvell* v. *Foster* [1954] 2 Q.B. 367; Nathan & Marshall, No. 6.

by the court. His duties terminate with the proper distribution of the estate, but his liabilities are limited only by effluxion of time; and solicitors who were sureties of an administrator and who handed over the residue of the estate to the administrator (who then absconded) were held liable on their bond.[57] An executor may of course decline to accept the office; but once he has proved the will (and once an administrator has been appointed) he cannot resign. A trustee is permitted to retire.[58]

(d) *Power to Appoint.* Personal representatives cannot exercise the statutory power of appointing new trustees,[59] nor, consequently, can they take advantage of section 40 of the Trustee Act 1925 under which the trust property, with some exceptions, vests in a trustee by virtue of his appointment.[60] In many situations, however, in which a person is appointed executor *and* trustee, that person's status will change from executor to trustee when the administration of the estate is complete. When that has occurred, he may of course make new appointments under section 36.[61]

It thus becomes important to ascertain when a personal representative becomes a trustee. Where, of course, a will appoints certain persons as executors and other persons as trustees, the executors, on the completion of the administration, must assent to the vesting of the property subject to the trust in the trustees. In the case of personalty the assent may be oral, or even implied[62]; in the case of realty however an assent must be in writing, and it becomes an essential document of title.[63]

When however, the executors are appointed trustees also, or where no provision is made for the appointment of trustees in a will which provides for property to be held in trust after the completion of administration, the question arises of the way in which, and of the time at which, the executors become trustees; and whether it is necessary for them to assent to the vesting of the property in themselves in their different capacity.

> In *Attenborough* v. *Solomon*,[64] the House of Lords held that a pledge by one of two executors, which was made thirteen years after the completion of the administration of the estate, passed no title to the pledgee. The executors had long since

57 *Harvell* v. *Foster*, *supra*.
58 T.A. 1925, s. 39; *post*, p. 306.
59 Given to trustees by T.A., s. 36; *post*, p. 298.
60 *Re King's W.T.* [1964] Ch. 542; Nathan & Marshall, No. 30; *post*, p. 302.
61 *Re Ponder* [1921] 2 Ch. 59; *Re Pitt* (1928) 44 T.L.R. 371; *Re Yerburgh* [1928] W.N. 208; *Re Cockburn* [1957] Ch. 438.
62 *Attenborough* v. *Solomon* [1913] A.C. 76.
63 A.E.A. 1925, s. 36 (4); *Re King's Will Trusts* [1964] Ch. 542.
64 [1913] A.C. 76.

become trustees; an assent in their own favour could be inferred from their conduct; and trustees must act jointly.

A similar view was taken in the cases allowing a personal representative to act as a trustee in the exercise of the statutory power of appointing new trustees.[65] *Harvell* v. *Foster*,[66] holding that the personal liability of an administrator and therefore of his sureties, continues after the completion of the administration, is not inconsistent with this view, for there is no reason why their liability should not continue after the change of status. In *Re King's Will Trusts*,[67] however, the contrary view was taken with regard to a holding of land. Pennycuick J. held that the executor could only become a trustee by means of a written assent in his own favour. This decision has been criticised,[68] and it may upset a number of titles which have relied on the practice established by earlier cases.[69] A purchaser is well advised to insist upon an assent in writing whenever the legal estate in land has been in the hands of personal representatives; but the terms of the Administration of Estates Act 1925, s. 36 (4),[70] do not seem to make a written assent essential in such cases.

ii. The Nature of the Interest of a Legatee or Devisee. A legatee or devisee does not, on the testator's death, become equitable owner of any part of the estate. The executor takes full title to the testator's property, not merely a bare legal estate.[71] He is, by virtue of his office, subjected to various fiduciary duties, which can be enforced against him by persons interested; and these duties are inconsistent with his holding the property on trust for the legatee or devisee.[72]

[65] *Re Ponder* [1921] 2 Ch. 59; *Re Pitt* (1928) 44 T.L.R. 371; *Re Cockburn* [1957] Ch. 438.

[66] [1954] 2 Q.B. 367.

[67] [1964] Ch. 542.

[68] (1964) 28 Conv.(N.S.) 298 (J. F. Garner); (1964) 108 S.J. 698, 719; (1964) 80 L.Q.R. 328 (R. R. A. Walker); see also *Williams on Title* (3rd ed.), p. 316 *et seq.* (considering the point as doubtful); *Emmet on Title* (15th ed.), pp. 1082–1083, 1105–1106; the requirement of an assent is however supported by Key and Elphinstone, *Conveyancing Precedents* (15th ed.), Vol. 1, p. 238 (para. 14) and p. 248 (note p); Prideaux, *Conveyancing Forms and Precedents* (25th ed.), Vol. 3, p. 909; Wolstenholme and Cherry, *Conveyancing Statutes* (12th ed.), Vol. 2, p. 1470; Farrand, *Contract and Conveyance*, p. 93 *et seq.*

[69] *Re Ponder* [1921] 2 Ch. 59; *Re Cockburn* [1957] Ch. 438 (not apparently cited in *Re King's Will Trusts* [1964] Ch. 542; (1964) 28 Conv.(N.S.) 302).

[70] *Ante*, p. 92.

[71] *Commissioner of Stamp Duties* (*Queensland*) v. *Livingston* [1965] A.C. 694 at pp. 707, 708, 712; Tiley, p. 177.

[72] *Sudeley* (*Lord*) v. *Att.-Gen.* [1897] A.C. 11; *Barnardo's* (*Dr.*) *Homes* v. *Income Tax Special Commissioners* [1920] 1 K.B. 468, 479; [1921] 2 A.C. 1; *Corbett* v. *Commissioners of Inland Revenue* [1938] 1 K.B. 567, 575–577; *Eastbourne Mutual Building Society* v. *Hastings Corporation* [1965] 1 W.L.R. 861 (intestacy); *Lall* v. *Lall* [1965] 1 W.L.R. 1249; (1965) C.L.J. 44 (S. J. Bailey); see also, for differing views, *Cooper* v. *Cooper* (1874) L.R. 7 H.L. 53; *McCaughey* v. *Com-*

The fiduciary duties of the personal representatives are "to preserve the assets, to deal properly with them, and to apply them in a due course of administration for the benefit of those interested according to that course, creditors, the death duty authorities, legatees of various sorts, and the residuary beneficiaries. They might just as well have been termed 'duties in respect of the assets' as trusts. What equity did *not*[73] do was to recognise or create for residuary legatees a beneficial interest in the assets in the executor's hands during the course of administration."[74] It may be, as with an insolvent estate, that nothing is left which can be applied for the benefit of those entitled under the will. Even if the estate is solvent, there cannot be said to be a trust of any property until property is allocated for the purpose. In the case of a residuary gift or a claim on intestacy, the allocation cannot occur until the residuary accounts are prepared; or, in the case of specific gifts, until the property is appropriated. At that stage, however, the interest of a legatee or devisee begins to look very much like that of a beneficiary under a trust. And, in the case of a residuary gift, this occurs at the time at which, for other purposes, as we have seen,[75] the executors are turning into trustees. Difficulties however remain:

(i) in the case of land where, as we have seen, the personal representatives cannot become trustees until they have assented in writing in their own favour.[76] Until that time, they remain personal representatives, but their duties and liabilities in regard to investments, etc., may become the same as those of trustees; and no doubt when the administration is complete a specific devisee of full age, etc., may call for the legal estate as he would be able to against a trustee; and

(ii) in the case of specific gifts where appropriation has taken place,[77] but the residuary account is not yet prepared.[78] The duties and liabilities of the personal representatives will then, it is submitted, be the same as those of a trustee; and the legatee should be entitled to demand the transfer of the specific property.[79]

missioner of Stamp Duties (1945) 46 S.R., N.S.W. 192; *Smith* v. *Layh* (1953) 90 C.L.R. 102; *Skinner* v. *Att.-Gen.* [1940] A.C. 350.

73 Italics mine.

74 *Per* Lord Radcliffe (1965] A.C. 694 at p. 707.

75 *Ante*, p. 92.

76 *Re King's Will Trusts* [1964] Ch. 542.

77 *Phillipo* v. *Munnings* (1837) 2 Myl. & Cr. 309.

78 *Re Claremont* [1923] 2 K.B. 718.

79 "Nevertheless, there are passages in the judgment (of the *Livingston* case [1965] A.C. 694, 707, 708) which seem to imply that it is not confined to gifts of residue and intestacies but extends also to virtually every type of testamentary gift." (1965) C.L.J. 44 at p. 45 (S. J. Bailey). *Cf. Re Cuff-Knox* [1963] I.R. 263.

G. Powers [80]

i. Trusts Imperative : Powers Discretionary. The distinction between trusts and powers is fundamental. Trusts are imperative, powers discretionary. Trustees must perform their trust. A donee of a power may exercise it or not, at his choice. This distinction may be illustrated by two comparisons.

(a) *Trust for Sale and Power of Sale.* A trust for sale of land imposes on the trustees an obligation to sell; equity, treating that as done which ought to be done, turns the land notionally into money from the moment at which the instrument creating it takes effect.[81] Similarly with a trust to invest money in the purchase of land; the money is notionally converted into land. This equitable doctrine of conversion will be discussed in more detail below,[82] It does not apply to a *power* of sale. Land which is subject to a power to sell only becomes money in the hands of the vendor when it is actually sold.

The inclusion of a power to postpone sale does not reduce a trust for sale of land, or a trust to invest money in the purchase of land, into a mere power. Provision for postponement has long been common in such trusts, and in the case of a trust for sale of land it is now statutory.[83] In the case of an express trust for sale, the decision to exercise the power to postpone must be unanimous [84]; If even a majority of the trustees wishes to postpone, the trust for sale prevails, and they will be directed, under the Law of Property Act 1925, s. 30, to effect a sale.[85]

(b) *Discretionary Trusts and Powers.* Where property is held by trustees on trust for specified beneficiaries, those beneficiaries, as we have seen, ordinarily "own" (equitable) proprietary interests. But those who are mere objects of a power own nothing. They merely have a hope that the power will be exercised in their favour. Until it is exercised, equitable ownership is in those who will take

[80] *Farwell on Powers* (3rd ed.); Halsbury's *Laws of England* (3rd ed.), Vol. 30, p. 206; (1957) 35 Can.B.R. 1060 (O. R. Marshall); (1953) 69 L.Q.R. 334 (D. M. Gordon); (1949) 13 Conv.(N.S.) 20 (J. G. Fleming); (1954) 18 Conv.(N.S.) 565 (F. R. Crane).

[81] *Post*, p. 506.

[82] *Post*, p. 505 *et seq.*

[83] L.P.A. 1925, s. 25.

[84] Unless a contrary intention appears in the disposition creating the trust; in such a case, and in the case of a statutory trust for sale, the trustees must, "so far as practicable, consult the persons of full age for the time being beneficially interested in possession in the rents and profits of the land . . . and shall, so far as consistent with the general interest of the trust, give effect to the wishes of such persons, or, in the case of dispute, of the majority . . ." L.P.A. 1925, s. 26 (3), as amended by L.P.(A.)A. 1926, Sched.

[85] *Re Hilton* [1909] 2 Ch. 548; *Re Mayo* [1943] Ch. 302; *Bull* v. *Bull* [1955] 1 Q.B. 234.

in default of the exercise of the power; their interest is subject to defeasance on such exercise.[86]

This distinction is however complicated by the fact that a trust may give to the trustees considerable discretion. A trustee may be given a discretion to select beneficiaries from a specified class, or to determine the proportions in which specified beneficiaries are to take. This is the basis of discretionary trusts. Under such a trust no member of the discretionary class of beneficiaries has an interest until the discretion has been exercised in his favour[87]; the trustees are however under a duty to consider the exercise of their discretion. It is not surprising that the dividing line between discretionary trusts and powers is difficult to draw.[88]

ii. Power in the Nature of a Trust; and Power Collateral, or Mere Power. Whether a limitation is a trust or a power depends, as would be expected, on the intention of the settlor, as disclosed by a proper construction of the words used. The use of the word "trust" or "power" is not conclusive; the court attempts to reach the substance of the matter, and has sometimes leant towards a construction which leads to validity where possible.[89] When a limitation which is phrased as a power is construed as a trust, it is sometimes called a "power in the nature of a trust"; but this phrase is not really satisfactory, for the situation is rather a particular form of trust—one in which the trustees have a power of selection. If the words used, on their proper construction, create a trust, the usual rules applicable to trusts (*e.g.*, as to certainty, formality, etc.) apply to this form.[90]

The question may be material in a number of circumstances, and arises particularly in two contexts.

(a) *Whether the Class Takes if the Discretion is not Exercised.* If there is a gift in favour of such members of a class as X shall select, and X fails to make a selection, will the gift take effect in favour of the class, or will it fail? If the power is construed as a mere power, the non-exercise of the power will cause it to fail. But if the gift is construed as a gift to the class subject to X's power of selection, the trust in favour of the class will take effect; and, equality being equity, each member takes an equal share.[91]

[86] Farwell, p. 310.
[87] *Gartside* v. *I.R.C.* [1968] A.C. 553; *Holmden* v. *I.R.C.* [1968] A.C. 685; *post*, p. 187. See, however, Finance Act 1969, ss. 36 (2), 37 (3).
[88] *Re Leek* [1969] 1 Ch. 563; *Re Gulbenkian's Settlements* [1968] 3 W.L.R. at pp. 1138–1139 *per* Lord Upjohn; *Re Baden's Deed Trusts* [1969] 3 W.L.R. 12.
[89] *Burrough* v. *Philcox* (1840) 5 Myl. & Cr. 72; *post*, p. 97; *Re Baden's Deed Trusts*, *supra*, at pp. 1021–1022.
[90] *Post*, Chap. 6.
[91] *Burrough* v. *Philcox*, *supra*; *Wilson* v. *Duguid* (1883) 24 Ch.D. 244; *Re Llewellyn's Settlement* [1921] 2 Ch. 281; *Re Arnold's Trusts* [1947] Ch. 131. See also (1967) 31 Conv. 117 (A. J. Hawkins).

In *Burrough* v. *Philcox*[92] a testator gave to X a power "to dispose of all my real and personal estates among my nephews and nieces or their children, either all to one of them, or to as many as [X] shall think proper." No appointments were made and the members of the class were held to take equally. On the other hand in *Re Weekes' Settlement*,[93] a testatrix gave to her husband a power "to dispose of all such property by will amongst our children," and there was held to be no trust.

The question is whether, on the proper construction of the limitation, it is possible to show an intention to benefit the objects of the power in the event of no appointment being made.[94] The courts are more inclined to such a construction when the objects of the power are small in number, such as children under a marriage settlement.[95] As Lord Cottenham put it in *Burrough* v. *Philcox*,[96] "When there appears a general intention in favour of a class, and a particular intention in favour of individuals of a class to be selected by another person, and the particular intention fails, from that selection not being made, the Court will carry into effect the general intention in favour of the class." The presence of a gift over in default of appointment destroys any such implication; the gift over shows that the settlor is providing for a situation where the donee does not appoint to the class.[97] But there is no hard and fast rule that a trust is intended if there is no gift over.[98]

(b) *Whether the Test for Certainty has been Satisfied.* In the situation just discussed, a construction which found an intention to create a trust tended towards the upholding of a limitation. Where the question at issue is one of certainty, the result is different. A rule requiring an element of certainty of objects applies, as we shall see, both to trusts[99] and powers.[1] But the rule is much stricter with trusts than with powers. If there is a gift to be held on trust "for the benefit of such one or more of the following persons as" X in his absolute discretion "shall decide, namely [my] wife, children or other issue or such other persons that [X] may consider to have

[92] (1840) 5 Myl. & Cr. 72.
[93] [1897] 1 Ch. 289; *Re Combe* [1925] Ch. 210; *Re Perowne* [1951] Ch. 785.
[94] *Harding* v. *Glyn* (1739) 1 Atk. 469; *Brown* v. *Higgs* (1799) 4 Ves.Jr. 708, 5 Ves.Jr. 495, 8 Ves.Jr. 561, 18 Ves.Jr. 192; *Re Llewellyn's Settlement* [1921] 2 Ch. 281; *Re Arnold* [1947] Ch. 131.
[95] *Re Perowne* [1951] Ch. 785 at p. 790.
[96] (1840) 5 Myl. & Cr. 72 at p. 92.
[97] This is so even if the gift is void; *Re Sprague* (1880) 43 L.T. 236. But it would not be so because of a residuary gift, or a gift over, in default of there being any objects of the power; *Re Brierly* (1894) 43 W.R. 36.
[98] *Re Weekes* [1897] 1 Ch. 289; *Re Combe* [1925] Ch. 210; *Re Perowne* [1951] Ch. 785; *Re Baden's Deed Trusts* [1969] 3 W.L.R. 12.
[99] *Post*, p. 125.
[1] *Post*, p. 105.

a moral claim upon" me,[2] such a limitation satisfies the test of certainty applicable to powers, but not that applicable to trusts.

Problems of certainty commonly arise in cases concerning modern forms of discretionary trust. In *Re Gestetner Settlement*,[3] the members of the discretionary class were a large group of people whose description was sufficiently certain if the limitation were construed as a power, but not sufficiently certain if they were beneficiaries under a trust. If the limitation contains a gift over in default, this, as we have seen, prevents a trust construction.[4] It is important, in drafting a settlement, to make very clear whether a trust or power is intended.

2. Classification of Trusts

Trusts have been variously classified and subdivided. The names given to different types of trusts are not terms of art; but they are commonly (even in statutes)[5] assumed to be so. The categories are not exclusive; some trusts could appear in more than one category.

The basic division is between private trusts, and public or charitable trusts. The latter are dealt with in Chapter 15. Private trusts are divided into express, constructive, implied and resulting trusts; and express trusts may be divided into executed and executory, and into completely constituted and incompletely constituted trusts.

A. Express trusts

An express trust is one created by act of the parties. Generally, as we will see, an intention in the settlor to create a trust in favour of specific beneficiaries must be shown. Two subdivisions of express trusts should be mentioned.

i. Executed and Executory. An executed trust is one in which the testator or settlor has marked out in appropriate technical expressions what interests are to be taken by all the beneficiaries; where he has, as the saying goes, "been his own conveyancer."[6] On the other hand, in an executory trust, he has indicated to his trustees a scheme for a settlement, leaving the details to be filled in by them.

The practical significance of the distinction is that while the language of executed trusts is governed by strict rules of construction,

[2] *Re Leek* [1969] 1 Ch. 563.
[3] [1953] Ch. 672; Nathan & Marshall, No. 10; *Re Baden's Deed Trusts, supra*; *post*, p. 192.
[4] *Ante*, p. 97.
[5] L.P.A. 1925, s. 53 (2); *post*, p. 119.
[6] *Per* Lord St. Leonards in *Egerton* v. *Lord Brownlow* (1853) 4 H.L.Cas. 1 at p. 210. In *Re Flavel's W.T.* [1969] 1 W.L.R. 444, Stamp J. refused to apply this principle to the setting up of a trust for employees of a company.

executory trusts are construed more liberally. Where, in the case of an executed trust, the settlor has made use of technical expressions, as to the interpretation of which the law has laid down rules, equity will follow the law and give effect to such interpretation.[7] In the case of an executory trust, however, equity will attach less importance to the use or omission of technical words, but will seek to discover the settlor's true intention, and order the preparation of a final deed which gives effect to such intention.

Executory trusts must themselves be subdivided, according as they arise under marriage articles on the one hand, or under other deeds or wills on the other. *Sackville-West* v. *Viscount Holmesdale*[8] shows that in the case of the former the presumption is that the intention was to provide for the issue of the marriage; the interests of the husband and wife will generally be construed as life interests,[9] unless it can be clearly established that the parties intended to entail or to bestow an absolute interest.[10] But in the case of executory trusts arising out of other deeds or wills, the court can approach the document with a more open mind, and will interpret it strictly on its merits.

Thus in *Sweetapple* v. *Bindon*[11] the testator gave £300 to trustees on trust to lay it out in the purchase of lands, and to settle such lands "to the only use of M. and her children," and if M. died without issue, "the land to be divided between her brothers and sisters then living." It was held that M. took an estate tail.

ii. Completely and Incompletely Constituted. There cannot be a trust unless the trust is completely constituted. This heading is therefore irrational; it is dealing, not with two different types of trust, but with a rule for distinguishing what is a trust from something that is void. Nevertheless, it is convenient to make the point here, and to deal in more detail with the matter below.[12]

A trust is only valid if the title to the property is in the trustee and if the trusts have been validly declared. A declaration that A

[7] *Re Bostock's Settlement* [1921] 2 Ch. 469; See also L.P.A. 1925, s. 60 (1); *cf. Re Arden* [1935] Ch. 326.

[8] (1870) L.R. 4 H.L. 543 (a case of an executory trust in a will). Lord Hatherley L.C. said: "The only difference in the case of a will, or deed of gift, not being marriage articles, is this, that the intent must appear in some manner on the face of the instrument in order to justify the Court in directing a settlement which does not follow the exact words employed in the instrument containing the executory trust, but by varying them effects the presumed intention of the parties" (at p. 554).

[9] See *Trevor* v. *Trevor* (1720) 1 P.Wms. 622; *Lambert* v. *Peyton* (1860) 8 H.L. Cas. 1.

[10] See *Powell* v. *Price* (1729) 2 P.Wms. 535.

[11] (1705) 2 Vern. 536. See also *Re Bannister* (1921) 90 L.J.Ch. 415.

[12] *Post*, p. 131 *et seq.*

holds on trust for B is ineffective if the property is not vested in A. The trust becomes constituted and valid when the property is vested in A. The vesting in A raises questions of the proper method of effecting such vesting, dependent on the nature of the property—land, chattel, money or a chose in action and the appropriate method must of course be used.[13] And in the case of a trust of land there must be written evidence of the declaration of trust.[14] The settlor may of course declare himself trustee, and there is then an automatic constitution, because title was in the settlor throughout.[15]

It was said that no trust was created unless the trust was completely constituted. This is true; but there are situations where intended beneficiaries under an incompletely constituted trust may compel the necessary transfer of the property to the trustees. In general, they can do so if they have given consideration[16]; but not if they are volunteers, for there is yet no trust and "equity will not assist a volunteer."[17]

B. Implied Trusts

In its simplest form a trust is implied where the court finds an intention to create a trust even though there is no proof of the use of express words. A trust may be found to exist although the word "trust" is never used, if the trust is the right way to implement the parties' intentions.[18] In one sense, such a trust is "express"; in another it is "implied." Again a secret trust[19] is "express" in one sense, and "implied" in another.

A trust may be implied even where the formalities necessary for the creation of an express trust are lacking. A declaration of trust respecting land must be manifested and proved by some writing; but this requirement does not apply to implied, resulting or constructive trusts.[20]

C. Resulting Trusts[21]

A resulting trust exists where property has been conveyed to another, but the beneficial interest returns, or "results" to the transferor. This may happen in various situations; the simplest one is where the property is conveyed to trustees for certain purposes which

[13] *Post*, p. 134 *et seq.*
[14] L.P.A. 1925, s. 53; *post*, p. 119.
[15] *Post*, p. 138 *et seq.*
[16] This includes, as we shall see, "marriage consideration."
[17] *Post*, p. 140 *et seq.*
[18] *Bannister* v. *Bannister* [1948] 2 All E.R. 133; Nathan & Marshall, No. 23.
[19] *Post*, p. 169.
[20] L.P.A. 1925, s. 53 (1) (2); see *Re Holt's Settlement* [1969] 1 Ch. 100 at p. 110 *et seq.*
[21] *Post*, p. 204 *et seq.*

do not exhaust the beneficial interest. The part undisposed of results to the transferor. For example, if there is a gift to A for life and then to X, if X attains the age of twenty-one, but X dies under twenty-one in A's lifetime, the property will result on A's death to the settlor. Or if property is given to trustees upon trust to pay £1,000 a year to A, and on A's death to B absolutely, and the income during A's lifetime is £5,000 a year, there will be a resulting trust of the surplus £4,000.

Such a trust may be regarded as an implied trust on the ground that the return of the undisposed interest is due to the implied intent of the transferor; but this theory cannot fit all the cases, for resulting trusts may arise so as to impose a tax liability on the settlor where this is just what he most wished to avoid.[22] Alternatively, resulting trusts may be regarded as due to the operation of a rule of law which says that the beneficial interest shall return to the settlor; this view would make the resulting trust more akin to the constructive trust. Or one can say that resulting trusts are *sui generis*.

D. Constructive Trusts [23]

While express trusts arise from the act of the parties, constructive trusts arise by operation of law. Equity just says that in certain circumstances the legal owner of property must hold it on trust for others. The absence of the need for formalities in such circumstances is obvious. There is much dispute and uncertainty as to the occasions on which constructive trusts arise, and also as to their nature.

The term has indeed been used in different senses, *e.g.* the obligation incumbent on a transferee from an express trustee, unless he proves he was a bona fide purchaser for value without notice, to hold the transferred property on the trusts previously applicable [24]; the obligation incumbent on a trustee who has made a profit, however innocently, through his office, to hold such profit for the benefit of his beneficiaries [25]; the position of a stranger to the trust who meddles with the trust property in such a way that equity will regard him as a *trustee de son tort* [26]; and a vendor of land is said to be a constructive trustee for the purchaser between the signing of the contract and the execution of the conveyance.[27] Moreover,

[22] *Vandervell* v. *I.R.C.* [1967] 2 A.C. 291; Nathan & Marshall, No. 22.
[23] *Post*, p. 218 *et seq.*
[24] See Maitland, p. 82.
[25] *Keech* v. *Sandford* (1726) Sel.Cas. t. King 61; Nathan & Marshall, No. 77; *Boardman* v. *Phipps* [1967] 2 A.C. 46; Nathan & Marshall, No. 78, *post*, p. 375.
[26] *Barnes* v. *Addy* (1874) L.R. 9 Ch.App. 244; Nathan & Marshall, No. 79; *Re Barney* [1892] 2 Ch. 265; *Carl-Zeiss Stiftung* v. *Herbert Smith and Co.* [1969] 2 W.L.R. 427; *post*, p. 225.
[27] *Post*, pp. 233–234.

as Maitland points out, the term is applied to fiduciary or quasi-fiduciary relationships other than that subsisting between trustee and beneficiary.[28] Indeed, the constructive trust is extended in most jurisdictions in America to become "one of the instrumentalities which a court of equity may employ to prevent the unjust enrichment of one person at the expense of another."[29] It then becomes an equitable remedy of a proprietary nature, available to prevent unjust enrichment, whenever the quasi-contractual remedy is inadequate.[30]

[28] Maitland, p. 80; *Selangor United Rubber Estates Ltd.* v. *Cradock* (*No.* 3) [1968] 1 W.L.R. 1555.
[29] Scott, *Cases on Trusts* (4th ed.), p. 771; Scott, *Trusts,* Chap. 13; (1955) 71 L.Q.R. 39 (A. W. Scott).
[30] (1959) 75 L.Q.R. 234 (R. H. Maudsley); Waters, *The Constructive Trust*; Goff and Jones, p. 38 *et seq.*; *post*, Chap. 13.

CHAPTER 5

POWERS

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1. POWERS [1] AND TRUSTS

A POWER is an authorisation to do certain things which affect property to which the appointor is not solely entitled, and in which he may have no beneficial interest at all. A person may hold a power in a personal or an official capacity; and the source of the power may be express grant or a statute. Thus trustees have by statute powers of investment,[2] sale,[3] leasing,[4] maintenance [5] and advancement,[6] and a power of appointing new trustees.[7] They may also be given other powers by the terms of the trust instrument, such as a power of appointment which enables those holding the power to effect the disposal of the settlor's property by "appointing" it to other people.

It has been seen that there are important points of distinction between powers and trusts.[8] Essentially a trust is imperative and a power discretionary. But the dividing line is not as clear as one would hope; for many trusts contain discretionary elements; and

[1] See Farwell; and Halsbury, Vol. 30, p. 206.
[2] T.I.A. 1961; *post*, p. 313 *et seq.*
[3] *Post*, p. 341 *et seq.*
[4] L.P.A. 1925, s. 28; S.L.A. 1925, s. 41.
[5] T.A. 1925, s. 31; *post*, p. 354 *et seq.*
[6] T.A. 1925, s. 32; *post*, p. 358 *et seq.*
[7] T.A. 1925, s. 36; *post*, p. 298.
[8] *Ante*, pp. 95–98.

many powers impose fiduciary obligations upon the holders of the power.

2. Bare Powers and Powers Ex Officio

A distinction must also be made between a bare power and a power to which some fiduciary obligation is attached, such as a power given to trustees of property exercisable in relation to that property. Several manifestations of this distinction will be explained in connection with powers of appointment. Of general application however is the rule that a bare power given to an individual can only be exercised by him [9]; and a "bare power given to two or more by name cannot be executed by the survivor." [10] But a power given to trustees is prima facie given to them *ex officio*, and may be exercised by the survivor,[11] or by their successors in office,[12] and powers given to two or more trustees jointly may be exercised by the survivor or survivors of them, or by the personal representatives of the last of them, pending the appointment of new trustees.[13]

3. Powers of Appointment

A power of appointment is one given (by the donor of the power) to the donee of the power (also the appointor) to appoint property to some person (the appointee). Such powers are useful in that they make it possible for the donee of the power to take into consideration circumstances existing at the date of the appointment which the settlor or testator could not have foreseen. They may also have some fiscal advantages.[14] Powers may be general, or special, or may be of a type which does not fit either category, usually called a hybrid power.

A. General, Special and Hybrid Powers

A gift to A for life with remainder to whomsoever he shall appoint is a general power; A may appoint to himself and become absolute owner. A general power is in most cases tantamount to ownership. If, however, in the illustration given above, the power were exercisable only by will, it would still be a general power even though A would then be unable to appoint to himself. A special

[9] *Re Harding* [1923] 1 Ch. 182; *Re Lysaght* [1966] Ch. 191; Nathan & Marshall, No. 58.
[10] Farwell, p. 514.
[11] *Re Bacon* [1907] 1 Ch. 475; *Bersel Manufacturing Co. Ltd.* v. *Berry* [1968] 2 All E.R. 552.
[12] *Re Smith* [1904] 1 Ch. 139; *Re De Sommery* [1912] 2 Ch. 622.
[13] T.A. 1925, s. 18, and see *ibid.* s. 36 (7); *Re Wills' Trust Deeds* [1964] Ch. 219, *post*, p. 115.
[14] *Post*, p. 192.

power is one in which the choice of appointees is restricted by the terms of the power: for example a power to appoint in favour of one's own children. The power is special even though the appointor is himself a member of the restricted group.[15] A power which does not fit neatly into these categories is one where the donee is given power to appoint to anyone except certain people or groups of people, for instance himself,[16] or to all persons living at the death of the donee[17]; such powers are called hybrid powers.

B. The Requirement of Certainty

The donee of a special power must, in making his appointments, keep within the terms of the power. It is essential that the terms should be sufficiently clear to enable him to do so. There has been a difference of judicial opinion on the question of the test to be applied. It is clear however that the test for powers is less strict than that applicable to trusts where, as will be seen, the rule is that a trust is too uncertain unless it is possible to ascertain at any given moment every living member of the class of beneficiaries.[18]

In the case of special powers of appointment two distinct tests have been suggested. The first is that a power is valid provided that it is possible to ascertain "whether any given postulant is a member of the specified class."[19]

Under this test a power to appoint in favour of employees, former employees (and their spouses) of a large public company or (in effect) any subsidiary company, was upheld[20]; similarly a power to a widow to appoint in favour of "such [forgotten] . . . friends as are nominated by my wife a sum not exceeding £25 per friend" with a maximum aggregate payment of £250[21]: and also a power to appoint in favour of "employees . . . ex-employees . . . [their] widows, infant children or other infant dependants" and "other dependent relatives."[22]

A new and more generous test however seemed to be emerging and was applied in *Re Gibbard*[23] to validate a gift to "any of my

[15] *Re Penrose* [1933] Ch. 793. See, however, Perpetuities and Accumulations Act 1964, s. 7.
[16] *Re Park* [1932] 1 Ch. 580; *Re Abraham's W.T.* [1969] 1 Ch. 463 at p. 474.
[17] *Re Jones* [1945] Ch. 105.
[18] *Post*, p. 125; *Re Ogden* [1933] Ch. 678; *I.R.C.* v. *Broadway Cottages Trust* [1955] Ch. 20; *Re Eden* [1957] 2 All E.R. 436; *Re Hain's Settlement* [1961] 1 W.L.R. 446; *Re Saxone Shoe Co.'s Trust Deed* [1962] 1 W.L.R. 943.
[19] *Re Gestetner Settlement* [1953] Ch. 672 at p. 688, *per* Harman J.; Nathan & Marshall, No. 10; *Re Sayer* [1957] Ch. 423 at p. 431: "Whether any particular *praepositus* was an object of the power."
[20] *Re Gestetner Settlement*, *supra*.
[21] *Re Coates* [1955] Ch. 495.
[22] *Re Sayer* [1957] Ch. 423.
[23] [1967] 1 W.L.R. 42: noted (1966) 30 Conv.(N.S.) 139.

old friends," where Plowman J. applied to this question the test applicable to the question of uncertainty in conditions precedent: namely, whether it is sufficiently certain to enable any one claimant to show that he comes within the description.[24] On this test the requirement is satisfied if one person can satisfy it; there is no need to show that a decision could be taken with respect to every possible applicant. The two tests were considered by the House of Lords in *Re Gulbenkian's Settlements, Whishaw* v. *Stephens.*[25]

Two settlements included a power to appoint in favour of Nubar Sarkis Gulbenkian "and any wife and his children or remoter issue . . . and any person . . . in whose house or apartments or in whose company or under whose care or control or by or with whom [he] may from time to time be employed or residing." The House of Lords, making sense of an essentially ungrammatical clause, unanimously upheld it.[26] The power would obviously satisfy the second test, as Nubar Sarkis Gulbenkian (and his wife) clearly qualified. It satisfied the first test also, and there was therefore no need to decide between them. Approval was given however, with Lord Donovan reserving his opinion, to the first test.

4. Exercise of Powers of Appointment

A. General Rule

No technical words are required for the exercise of a power. "All that is requisite is an intention on the part of the donee that the fund shall pass to some one who is an object of the power."[27] If the appointment relates to land, it must comply with Law of Property Act 1925, s. 53 (1), and be "manifested and proved by some writing signed by some person who is able to declare such trust or by his will"; an appointment of personalty may be made orally. The terms of the power may require certain further formalities for its exercise and these, subject to the provisions of Law of Property Act 1925, s. 159, below, must be strictly complied with. Thus, "if a power is to be executed by deed, it cannot be validly exercised by will,"[28] and "a power to be executed by will cannot be validly

[24] *Re Allen decd.* [1953] Ch. 810; *Re Lysaght* [1966] Ch. 191: applied also in *Re Gulbenkian's Settlements* in the Court of Appeal, see [1968] Ch. 126.

[25] [1968] 3 W.L.R. 1127.

[26] Overruling *Re Gresham's Settlement* [1956] 1 W.L.R. 573.

[27] Farwell, p. 218.

[28] Farwell, p. 197; *Lord Darlington* v. *Pulteney* (1797) 3 Ves.Jr. 384; *Lady Cavan* v. *Doe* (1795) 6 Bro.P.C. 175; *Re Phillips* (1884) 41 Ch.D. 417 at p. 419.

exercised by any instrument to take effect in the lifetime of the donee of the power." [29]

B. Excessive Execution [30]

The donee has only the power which is given to him by the instrument. Thus he may not exercise it in favour of non-objects; nor impose unauthorised conditions. Difficult questions can arise when an appointment is partly good and partly bad, as where there is an appointment of a sum greater than that authorised; or where some of the appointees are objects and some are not. The rule is that the court will sever the good from the bad where possible: " . . . if there is a complete execution of the power with the addition of something improper, the execution is good and the excess bad, whereas if there is no complete execution, or if the boundaries between the excess and the execution are not distinguishable, the whole appointment fails; in order to be valid, the appointment must be distinct and absolute." [31] It is believed that this rule will apply where the exercise of a power makes an appointment and contains a release; if the release is invalid, the rest of the appointment may stand.[32]

C. Defective Execution

The donee of a power should exercise it in accordance with the provisions of the instrument creating it. Thus the necessary formalities should be observed, and the required consents obtained. Failure to comply will usually render the exercise void. But there is a jurisdiction in equity and under statute to validate certain cases of defective execution.

i. In Equity. Where the donee, " in discharge of moral or natural obligations, shows an intention to execute [a] power " [33] equity will act upon the conscience of those entitled in default to compel them to make good the defect in the execution.

The essential features of the intended execution must be proved; these are " the intention to pass the property . . . the persons to be benefited . . . the amount of the benefit and . . . good consideration." [34] There will never be relief against the non-execution of a

[29] Farwell, p. 198; *Reid* v. *Shergold* (1805) 10 Ves.Jr. 370; *Re Evered* [1910] 2 Ch. 147 at p. 156.
[30] See Farwell, Chap. 6; Halsbury, Vol. 30, p. 269.
[31] Halsbury, Vol. 30, p. 269; *Re Holland* [1914] 2 Ch. 595; see also Halsbury, Vol. 30, pp. 270–272, for illustrations of the general rule. The rule applies also where part of the appointment is void under the doctrine of " fraud on a power," *post*, p. 112.
[32] *Post*, p. 114.
[33] Farwell, p. 378; *Chapman* v. *Gibson* (1791) 3 Bro.C.C. 229 at p. 230.
[34] Farwell, p. 379; *Garth* v. *Townsend* (1869) L.R. 7 Eq. 220; *Kennard* v. *Kennard* (1872) L.R. 8 Ch.App. 227.

power,[35] except perhaps in the case of fraud by the person entitled in default.[36]

The jurisdiction applies to the execution of express powers generally, but not to defective execution of statutory powers; for "it is difficult to see how the court can give validity to any such act if done otherwise than in accordance with the statutory requirements; to give relief in such a case would be to legislate afresh."[37] It seems however that an agreement for a lease is enforceable against a tenant for life acting under a statutory power so as to bind the interest of the tenant to the extent to which he is able to bind it.[38]

ii. By Statute. (a) *Leases.* By Law of Property Act 1925, s. 152 (1), a lease granted under a power which is invalid by reason of any failure to comply with the terms of the power, may, if it was entered into in good faith and the lessee has entered thereunder, take effect as a contract to grant the lease[39]; and should be registered as an estate contract.

(b) *Appointment Inter Vivos.* Law of Property Act 1925, s. 159, provides that the execution of a deed of appointment will be valid if executed in the presence of and attended by two or more witnesses,[40] even though it does not comply with additional formalities stipulated in the instrument. This provision does not however dispense with any necessary consents nor does it apply to any acts required to be performed which have no relation to the mode of executing and attesting the document.[41] Nor does it require a power to be exercised by deed where another method of exercise complies with the terms of the power.

(c) *Appointment by Will.* Similarly, an appointment by will is valid as regards execution and attestation if the provisions of the Wills Acts relating to the formalities of wills are complied with.[42]

5. Delegation of Powers

In general, a person to whom a discretion has been given, whether personally or by virtue of his being in a fiduciary relationship, may

35 *Tollet* v. *Tollet* (1728) 2 P.Wms. 489 at p. 490; *Holmes* v. *Coghill* (1806) 12 Ves.Jr. 206.

36 *Luttrell* v. *Olmius* (1787) cited at 11 Ves.Jr. 638; *Bath and Montague's Case* (1693) 3 Ch.Cas. 84 at pp. 108, 122; *Vane* v. *Fletcher* (1717) 1 P.Wms. 352 at p. 355; Farwell, pp. 383–385.

37 Farwell, p. 394.

38 *Dyas* v. *Cruise* (1845) 2 Jo. & La T. 460; explaining *Harnett* v. *Yielding* (1805) 2 Sch. & Lef. 549; Farwell, p. 399.

39 *Pawson* v. *Revell* [1958] 2 Q.B. 360.

40 "in the manner in which deeds are ordinarily executed and attested."

41 Subs. (2).

42 Wills Act 1837, s. 10; Wills Act 1963, s. 2; *Taylor* v. *Meads* (1865) 4 De G. J. & S. 597 at p. 601.

not delegate his discretion to others. *Delegatus non potest delegare.*[43] The maxim does not apply to a mere ministerial duty [44]; nor to the case of a general power which is equivalent to absolute ownership.[45] But most powers involve a discretion and this prevents delegation.[46] Special questions arise as to the validity of powers inserted in wills which in effect delegate to the donees the testator's power of testamentary disposition.[47] A tenant for life may not delegate his statutory powers.[48] In the absence of express provision in the instrument creating a special power,[49] the donee may not appoint on discretionary trusts [50]; if he appoints on protective trusts,[51] the determinable life interest will be valid, but the discretionary trusts due to take effect on forfeiture of the life interest are void and the trusts in default take effect.[52] There is no objection however to the inclusion in an appointment of a power of advancement.[53] Before 1926, the inclusion of such a power of advancement "had become a common form conveyancing practice" [54]; and "legislative recognition has now been given to the old practice in the form of the statutory power of advancement conferred by section 32 (1) of the Trustee Act 1925, so that the question is no longer likely to arise." [55] Generally, where it is desired that the donee should be able to make an appointment which itself includes a power of appointment or involves any other delegation of discretion, express provision should be made in the instrument creating the power.

6. Fraud on a Power

An appointor, in the typical case of a special power of appointment with a gift over in default, is under no duty to exercise the power

[43] *Post*, p. 362.
[44] *Att.-Gen.* v. *Scott* (1750) 1 Ves.Sen. 413 at p. 417; *Re Hetling and Merton's Contract* [1893] 3 Ch. 269; Farwell, pp. 503–504.
[45] Farwell, p. 505; *White* v. *Wilson* (1852) 1 Drew. 298 at p. 304; *Re Triffitt's Settlement* [1958] Ch. 852 (a hybrid power).
[46] *Combe's Case* (1613) 9 Co.Rep. 75a; *De Bussche* v. *Alt* (1878) 8 Ch.D. 286; *Re Morris' Settlement* [1951] 2 All E.R. 528; *Re Hunter's W.T.* [1963] Ch. 372; (1954) 23 Conv.(N.S.) 27, 423 (D. W. M. Waters).
[47] (1953) 69 L.Q.R. 334 (D. M. Gordon); *Re Triffitt's Settlement, supra*; *Tatham* v. *Huxtable* (1950) 81 C.L.R. 639.
[48] S.L.A. 1925, s. 104; but trustees for sale may delegate their powers of management to the tenant for life; L.P.A. 1925, s. 29.
[49] *Per* Evershed M.R. in *Re Morris' Settlement, supra*, at pp. 530–531.
[50] *Re Morris' Settlement* [1951] 2 All E.R. 528 at pp. 532–533, *per* Jenkins L.J.
[51] *Post*, p. 171 *et seq.*
[52] *Re Boulton's S.T.* [1928] Ch. 703; *Re Morris' Settlement, supra; Re Hunter* [1963] Ch. 372.
[53] *Re May's Settlement* [1926] Ch. 136; *Re Joicey* [1915] 2 Ch. 115; *Re Mewburn's Settlement* [1934] Ch. 112; *Re Morris' Settlement* [1951] 2 All E.R. 528; *Re Wills' W.T.* [1959] Ch. 1; *Pilkington* v. *I.R.C.* [1964] A.C. 612; Nathan & Marshall, No. 108, *post*, p. 362.
[54] *Per* Evershed M.R. in *Re Morris' Settlement, supra.*
[55] *Per* Jenkins L.J. *op. cit.*, pp. 532–533; see also Maugham L.J. in *Re Mewburn's Settlement, supra.*

but, if he chooses to exercise the power, he must exercise it honestly. This does not mean that he must weigh the merits of the possible beneficiaries; he may appoint all the available assets to any one beneficiary, who may indeed be himself.[56] But it does mean that he must exercise it within the limits imposed by the donor or testator who created it. If, of course, he expressly exceeds those limits the exercise of the power will be void unless it can be cut down by severing the invalid excess.[57] But the doctrine of fraudulent exercise of a power goes further than this, for it extends to the intent with which a power is exercised. The theory is that, in the case of a special power, the property is vested in those entitled in default of its exercise subject to its being divested by a proper exercise of the power; and that an exercise of the power for "any bye or sinister object" is not proper, is a fraud on those entitled in default, and void.[58]

A. Prior Agreement

The first type of case in which an apparently valid exercise of a power will be void for what in this context is termed fraud[59] is where the appointment is made as the result of a prior agreement or bargain with the appointee as to what he will do with the proceeds. Such an exercise of a power will be wholly void save when the appointor is the person entitled in default, or where the person entitled in default is a party to it.[60]

B. Benefit to Appointor

A second type of case is where the power is exercised so as to benefit the appointor. The benefit is usually financial in character, as where an appointment is made to an ailing child by its father, who will benefit on the child's death,[61] but it is not restricted to financial benefit.[62] For the exercise of the power to be void, there must be more than a hope of benefit. Thus an appointment to a healthy child by a father will be valid.[63] For fraud to operate, the appointment must have been made with intent to benefit the

56 *Re Penrose* [1933] Ch. 793.
57 *Churchill* v. *Churchill* (1867) L.R. 5 Eq. 44; *Re Oliphant* (1917) 86 L.J.Ch. 452.
58 *Portland* v. *Topham* (1864) 11 H.L.Cas. 32 at p. 54 *per* Lord Westbury; *Vatcher* v. *Paull* [1915] A.C. 372; Tiley, p. 317. *Cf. Re Greaves* [1954] Ch. 434 at p. 446 *per* Evershed M.R.; Tiley, p. 318.
59 See the classification in Farwell, p. 460, and also Sheridan, *Fraud in Equity*, p. 116 *et seq.*
60 See generally *Vatcher* v. *Paull* [1915] A.C. 372; Tiley, p. 317.
61 *Lord Hinchinbroke* v. *Seymour* (1789) 1 Bro.C.C. 395.
62 *Cochrane* v. *Cochrane* [1922] 2 Ch. 230.
63 *Henty* v. *Wrey* (1882) 21 Ch.D. 332.

appointor. An appointment is sometimes made, however, which in fact benefits the appointor, but which is clearly intended to, and does, benefit the appointees; this is true of many an appointment that forms part of the variation of a trust, for the saving of tax and estate duty will be a benefit to the appointor. Thus in *Re Merton*,[64] Wynn-Parry J. decided that there was no inflexible rule that forced him to declare such an exercise of a power to be void. The intent that renders an appointment void is a matter "of fact or of inference rather than of law,"[65] and must be ascertained as a single fact after consideration of all the relevant evidence.[66] In the context of variation of trust however, recent cases have shown a reluctance to apply this benevolent view.[67]

C. Non-objects

An appointment is sometimes drafted so that the intent appears to be to benefit objects of the power, but the real intent is to benefit non-objects. It will then be void, even though the appointee was in no sense a party, and might not even have known of the appointment or its intent. It may still be true that the "execution of the power is alien in reality . . . to the power conferred."[68] A modern example is provided by *Re Dick*.[69]

A widow had a power to appoint amongst her brothers and sisters and their issue, but she wished to provide for a family who were looking after her. She had inadequate free capital to do so. She appointed by will to her favourite sister, but coupling the appointment with a request "without imposing any trust or legal obligation" that the sister should provide an annuity for the family concerned. The Court of Appeal held that the absence of obligation on the appointee was not crucial; but rather that the whole intent in making the appointment was to secure a benefit to non-objects by subjecting the appointee to "strong moral suasion to benefit a non-object, which suasion the [appointee] would, in the appointor's opinion, be unable to

[64] [1953] 1 W.L.R. 1096 especially at p. 1100; *Re Robertson's W.T.* [1960] 1 W.L.R. 1050.
[65] *Re Holland* [1914] 2 Ch. 595 at p. 601 *per* Sargant J.
[66] *Re Crawshay* [1948] Ch. 123.
[67] *Re Wallace's Settlements* [1968] 1 W.L.R. 711; *Re Brook's Settlement* [1968] 1 W.L.R. 1661; *post*, p. 390; [1968] B.T.R. 199 (J. G. M.); (1969) 32 M.L.R. 317 (S. M. Cretney).
[68] *Re Nicholson's Settlement* [1939] Ch. 11 at p. 19 *per* Clauson L.J.; Tiley, p. 324. This case decided that the doctrine as to the real intent behind an appointment did not apply to a power exercisable only in favour of one person and so exercised. But see the criticism in Sheridan, *Fraud in Equity*, p. 122.
[69] [1953] Ch. 343; Tiley, p. 321. *Cf. Re Marsden's Trusts* (1859) 4 Drew. 594.

resist." [70] This intent was enough to constitute the exercise of the power as fraudulent.

Difficulties arise from this rule as to real intent, for it is not easy to distinguish cases such as *Re Dick* [71] from cases where there was a real intent to benefit the appointee but coupled with a hope that the appointee would benefit a non-object, which cases are of course not within the doctrine of fraud on a power. But the intent in many cases is simply dual—genuinely to benefit the appointee but also to subject him to strong moral suasion as to part of the benefit appointed. It may therefore be relevant in *Re Dick* [71] that a substantial proportion of the sum appointed would have been absorbed by the annuity and that a great deal of planning and discussion had gone into the making of the appointment coupled with the expression of the request in formal memoranda. For the danger inherent in extending the doctrine too far is that, if the appointment is void, the appointee loses all benefit unless the appointor is alive to re-appoint,[72] a loss to the appointee which is not justified if intent to benefit him was a substantial element in the exercise of the power.

D. Excessive Exercise; Severance

That the intent with which a power is exercised cannot be investigated too rigidly is also shown by the cases which cut down a power excessively exercised. If there is a genuine intent to benefit the appointee, something expressly superadded so as to benefit a non-object can be severed, leaving the appointment valid.[73] But severance will not occur in the absence of such a genuine intent.[74] Again if, in a will by which he exercises a power, a testator makes a gift of *his own* property conditional on the appointee resettling the *appointed* property, this is a valid condition on his own gift and the exercise of the power also is valid, provided there was a genuine intent to benefit the appointee.[75] This would be difficult to reconcile with strict emphasis on the intent with which a power was exercised as being " entire and single." [76]

[70] The matter was put in this way by Cohen L.J. in *Re Crawshay* [1948] Ch. 123 at p. 135, a case which contained the additional vitiating factor of a covenant by the appointee assigning to non-objects any benefits received by the exercise of the power; (1948) 64 L.Q.R. 221 (H. G. Hanbury).

[71] [1953] Ch. 343.

[72] There can be no severance in these cases as there is nothing to sever. But *Re Chadwick's Trusts* [1939] 1 All E.R. 850 shows that a fresh appointment is valid if free from the element that vitiated a prior one.

[73] *Re Holland* [1914] 2 Ch. 595; followed in *Re Burton's Settlements* [1955] Ch. 82; Tiley, p. 328.

[74] *Re Cohen* [1911] 1 Ch. 37. Severance will not of course occur when there has been a prior agreement with the appointee.

[75] *Re Burton's Settlements* [1955] Ch. 82; Tiley, p. 328.

[76] In *Re Simpson* [1952] Ch. 412, Vaisey J. had held that *Re Crawshay* and *Re Dick* impelled him to take this strict view on facts analogous to those in *Re*

E. Releases

The doctrine of fraud on a power does not apply to releases, for releases simply benefit those entitled in default. It is irrelevant that the appointor, in releasing his power, is intended to benefit thereby, as he has no duty in respect of the disappointed appointees.[77] Nor does the doctrine apply to the revocation of the exercise of a power.[78] Where the appointor may revoke, he has a right to do so and, in exercising it, he is under no duties. It has even been said that, in revoking, he may stipulate for a benefit, but it would be strange if, by first exercising a power and then revoking it, an appointor could obtain a benefit rightly denied him on an appointment, and it is significant that, in the leading case,[78] the revocation was followed by a release.[79]

F. Position of Third Parties

The position of a bona fide purchaser, for instance a mortgagee, of an interest appointed to his vendor in such a manner as to amount to a fraud on the power is complicated. Those entitled in default of appointment who can challenge the exercise of power as fraudulent have an interest in the property appointed that in principle prevails over the interest of its bona fide purchasers for value,[80] it being significant, of course, that no legal title passes under the ordinary power of appointment since 1925. The Law of Property Act 1925, s. 157, protects such purchasers, but only if the vendor-appointee was at least 25 years of age at the time of sale, and only to the extent to which he was presumptively entitled in default of appointment. Apart from this curious and limited protection, a fraudulent appointment is void even against a bona fide purchaser.

7. Release of Powers

A. Why Release?

As a power is always discretionary, it may be asked why it becomes advantageous to release it as opposed merely to not exercising it. This may be for various reasons; for example, to create indefeasible interests in those entitled in default,[81] to make a gift charitable by releasing a power to appoint to anyone else,[82] and

Burton's Settlements, in which case, however, Upjohn J. rightly refused to follow the lead.

77 *Re Somes* [1896] 1 Ch. 250. Releases may be an important element in the variation of a trust: *Re Ball's Settlement Trusts* [1968] 1 W.L.R. 899, *post*, p. 389.

78 *Re Greaves* [1954] Ch. 434; Tiley, p. 318.

79 *Cf.* Evershed M.R. in *Re Greaves*, *supra*, at p. 448.

80 *Cloutte* v. *Storey* [1911] 1 Ch. 18.

81 *Re Mills* [1930] 1 Ch. 654.

82 *Re Wills* [1964] Ch. 219.

especially to avoid the effect of the Finance Act 1958, s. 22 (1), which in effect provides that if any person has power to appoint any of the trust property (including the income) to the settlor or the spouse of the settlor, the whole of the income of the settlement is deemed to be that of the settlor. Up to that date, it had been common to include the wife of the settlor as a member of the discretionary class; and it thus became important to exclude her.[83] This was usually done by exercising the trustees' power to appoint on new trusts which were identical with the old ones except that the wife was omitted. This is in effect a partial release of the earlier power, and is treated as such.[84] As we will see, many of the releases which have been made in this way are of doubtful validity.

B. How to Effect a Release

Trustees may in effect surrender their trusts and powers by paying the money into court under the Trustee Act 1925, s. 63[85]; or they may apply to the court for an administration order; or they may ask the court for directions as to the way in which they should act on questions arising in the administration of the trust. Usually, however, the court will not give general directions concerning the exercise of discretionary powers in the future.[86]

They may also effect a release of a power, in appropriate circumstances, by executing a deed of release, or by a contract not to exercise the power.[87] A power may also be extinguished by implication by any dealing with the property by the donee which is inconsistent with its further exercise[88]; or by obtaining the approval of the court to an arrangement which is so inconsistent. There is much uncertainty concerning the validity of releases in some circumstances, and it is important that express provision should be made in the instrument creating the power which expressly authorises the donees of the power to release it.[89]

C. Validity of Release

It is not possible to lay down with confidence what are the circumstances in which, in the absence of express provision, a release

[83] F.A. 1958, s. 22 (5).
[84] *Re Wills*, *supra*; *Muir* v. *I.R.C.* [1966] 1 W.L.R. 251 and 1269.
[85] *Post*, p. 326; this is now rare (1968) 84 L.Q.R. 67 (A. J. Hawkins).
[86] *Re Allen-Meyrick's W.T.* [1966] 1 W.L.R. 499; (1967) 31 Conv.(N.S.) 117 (A. J. Hawkins); *post*, p. 326.
[87] L.P.A. 1925, ss. 155, 160.
[88] *Foakes* v. *Jackson* [1900] 1 Ch. 807; *Re Christie-Miller's Settlement* [1961] 1 W.L.R. 462; *Re Wills* [1964] Ch. 219; *Muir* v. *I.R.C.* [1966] 1 W.L.R. 251, 1269; *Re Courtauld's Settlement* [1965] 2 All E.R. 544; (1968) 84 L.Q.R. 92–93 (A. J. Hawkins).
[89] *Muir* v. *I.R.C.* [1966] 1 W.L.R. 1269.

will be valid. The matter is not made easier by a great confusion in terminology.

Powers used to be divided into those which are appendant, in gross, or collateral. The two former could be released; but collateral powers "that is a power to a stranger, who has no interest in the land," or "where it is to be exercised for the benefit of another"[90] could not. But this rule was changed in 1881 by the predecessor to the Law of Property Act 1925, s. 155, which enacts that: "A person to whom any power, whether coupled with an interest or not, is given may by deed release or contract not to exercise, the power."[91]

Almost immediately the question arose whether this provision applied to a situation where the donees of the power were trustees who held the power in a fiduciary capacity. Admittedly they cannot be compelled to exercise it; but can they be allowed to release it? The courts answered this question in the negative[92]; and the search at the present day is for a test to determine which are the cases to which the statute does not apply.

i. Trusts. The first category is that discussed above where the situation is not really a power but a trust. Here the trustees are under a duty to appoint; if they fail to do so, the court will declare the property to be held on trust for the class of possible appointees in equal shares.[93] There is no question of release here.

ii. Powers Conferred Virtute Officii. Where a power is conferred upon a person *virtute officii*,[94] he may not release it. Here there may be a gift over in default, either to the class of appointees or to a different class. This is a power proper, and not a trust. But the power is one given to the trustees to be exercised in a fiduciary capacity. They cannot discard it. This is so whether it is given to them as trustees, or whether it is given to persons by name "if on the true view of the facts, they were selected as donees of the power because they were trustees."[95] Conversely, persons selected as individuals may be described as trustees. In *Re Wills' Trust Deeds*[96] a power of appointment in respect of property which was the subject of a *settlement* was given to the trustees of the settlor's *will*; this was not given *virtute officii*.

[90] *West* v. *Berney* (1819) 1 Russ. & My. 431 at p. 434.
[91] This does not apply to a tenant for life of settled land; S.L.A. 1925, s. 104.
[92] *Re Eyre* (1883) 49 L.T. 259; *Weller* v. *Kerr* (1866) L.R. 1 Sc. & D. 11; *Saul* v. *Pattinson* (1886) 55 L.J.Ch. 831.
[93] *Brown* v. *Higgs* (1803) 8 Ves.Jr. 561; *Burrough* v. *Philcox* (1840) 5 Myl. & Cr. 72; *Re Weekes* [1897] 1 Ch. 289; Nathan & Marshall, No. 9; *Re Combe* [1925] Ch. 210; *Re Perowne* [1951] Ch. 785; (1967) 31 Conv.(N.S.) 117 (A. J. Hawkins).
[94] Often called a power coupled with an interest.
[95] Lewin, p. 387; *Lane* v. *Debenham* (1853) 11 Hare 188; *Hall* v. *May* (1857) 3 K. & J. 585; *Re Cookes' Contract* (1877) 4 Ch.D. 454.
[96] [1964] Ch. 219.

iii. Personal Powers. Where the power is given to a person in his private capacity, the donee is prima facie able to release it.[97] In *Re Wills' Trust Deeds*[98] Buckley J. made as an exception to this rule the case where, in default of appointment, there was a trust in favour of the objects of the power[99]; but it seems that such a power can be released,[1] even if the release operates in favour of the donee, as where a father releases a power so that the shares of his sons (who are entitled in default) become absolute, and that of a deceased son passes to the donee.[2] A release, or a covenant not to exercise it, ("which will be equivalent to a release")[3] may be effective if it refers only to part of the property,[4] or if it relates only to one or more of several objects.[5]

iv. Variation of Trusts Act 1958. Section 1 of the Variation of Trusts Act 1958 makes no express reference to powers. Many powers are vested in trustees, as in the case of discretionary or protective trusts, and a variation of such powers, with the consent of the court, will no doubt be covered by the provisions of the sections relating to variation of trusts. It appears however that an arrangement under the Act which recites the release of a power,[6] or one which is inconsistent with the future exercise of the power,[7] will effectively release it.

97 This is Buckley J.'s fifth category in *Re Wills' Trust Deeds* [1964] Ch. 219.
98 [1964] Ch. 219.
99 Buckley J.'s second category: [1964] Ch. 219.
1 *Smith* v. *Houblon* (1859) 26 Beav. 482.
2 *Re Radcliffe* [1892] 1 Ch. 227; an appointment in favour of the estate of the deceased son would have been a fraud on the power.
3 *Per* Buckley L.J. in *Re Evered* [1910] 2 Ch. 147 at p. 161.
4 *Re Evered, supra.*
5 *Re Brown's Settlement* [1939] Ch. 944; Farwell, p. 16.
6 *Re Christie-Miller's S.T.* [1961] 1 W.L.R. 462.
7 *Re Courtauld's Settlement* [1965] 2 All E.R. 544; *Re Ball's S.T.* [1968] 1 W.L.R. 899.

CHAPTER 6

REQUIREMENTS OF A TRUST

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1. CAPACITY TO CREATE A TRUST

CAPACITY to create a trust is, generaly speaking, co-extensive with the ability to hold and dispose of a legal or equitable interest in property. But there are some exceptions:

A. Infants or Minors [1]

A settlement made by an infant is voidable; he may repudiate it during infancy, or within a reasonable time of attaining his majority.[1a]

The age of majority is changed from twenty-one to eighteen by the Family Law Reform Act 1969, s. 1, as from the date to be determined by the Lord Chancellor on which section 1 shall come into force.[2] From that date any reference in any statutory provision, deed, will or other instrument to infancy or similar expression is to be construed as a reference to ages below eighteen,[3] and the reference to the age of twenty-one years is changed in most statutes to the age of eighteen.[4] The time at which a person attains a particular age is the first moment of the relevant birthday and not, as hitherto in most cases, the first moment of the preceding day.[5]

Prior to the coming into force of the 1969 Act, the High Court had power, under the Infant Settlements Act 1855, to give its approval to settlements of real and personal property made upon or

[1] "A person who is not of full age may be described as a minor instead of as an infant. . . ." Family Law Reform Act 1969, s. 11.
[1a] *Edwards* v. *Carter* [1893] A.C. 360.
[2] s. 25 (3).
[3] s. 1 (2).
[4] Sched. 1. The statutory provisions in Sched. 2 are excepted.
[5] s. 9.

in contemplation of marriage by males not under twenty years of age and females not under seventeen; such approval made the settlement binding. The court could approve a settlement made after marriage [6] whether or not the infant was a ward of court.[7] Section 10 of the Family Law Reform Act 1969 repeals the Infant Settlements Act 1855.

An infant may not, since 1925, hold a legal estate in land [8]; if an infant becomes entitled to a fee simple absolute in possession, the land becomes settled land.[9] Infancy for these purposes will terminate at eighteen after the Family Law Reform Act 1969, s. 1, comes into effect.

B. Mentally Abnormal Persons

Under the Mental Health Act 1959, s. 102, the Court of Protection has wide powers of dealing with the property and affairs of a person whom the judge is satisfied is incapable, by reason of mental disorder, of managing and administering his property and affairs.[10] The judge may make an order providing for the maintenance or benefit of the patient or of members of his family, or for making [11] provision for other persons or purposes for whom or for which the patient might be expected to provide if he were not mentally disordered, or otherwise for administering the patient's affairs.[12]

Applications to the court for the approval of schemes affecting the patient's property are commonly brought in circumstances in which it is desirable in the interests of the family to reduce the estate duty liability of a rich patient. The applicant must show that the scheme is for the benefit of the patient [13]; it is sufficient that it is the sort of settlement which the patient would be likely to make in favour of other members of the family if he had been sane.[14] Similarly, if a patient has a life interest under an existing settlement, an application may be made under the Variation of Trusts Act 1958 to vary the settlement for estate duty purposes.[15]

[6] *Re Sampson and Wall* (1884) 25 Ch.D. 482.
[7] *Re Adams* [1943] Ch. 155.
[8] L.P.A. 1925, s. 1 (6).
[9] S.L.A. 1925, s. 1 (1) (ii) (*d*).
[10] M.H.A. 1959, s. 101; for the general jurisdiction to do what is beneficial, see *Re Ryan* [1911] W.N. 56.
[11] A judge may order a settlement for this purpose; M.H.A. 1959, s. 103 (1) (*d*).
[12] M.H.A. 1959, s. 102 (1). For the jurisdiction of the Court of Chancery, see *Re K.'s S.T.* [1969] 2 W.L.R. 219.
[13] See *Re Ryan, supra.*
[14] Morcom, pp. 41, 43: see also *Re C.W.M.* [1951] 2 K.B. 714; *Re C.* [1960] 1 W.L.R. 92; *Re C.E.F.D.* [1963] 1 W.L.R. 329.
[15] *Re Sanderson's S.T.* [1961] 1 W.L.R. 36; *Practice Direction* [1960] 1 W.L.R. 17; *Re C. L.* [1969] 1 Ch. 587.

2. Formalities

A. Inter Vivos

i. Creation. The basic rule is that a settlor may create a trust by manifesting an intention to create it.[16] With the exception of trusts of land, no formalities are required.[17] It is necessary however to observe literally every word of the basic rule. The intention must be to *create a trust*; a general intention to benefit someone will not suffice.[18] The words or acts of the settlor must be sufficient to establish an intention that either another person, or the settlor himself, shall be trustee of property for the beneficiary.

With regard to trusts of land, the Law of Property Act 1925, s. 53 (1) (*b*), provides:

> "A declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will."[19]

It will be seen that the writing is required as evidence of proof of intention; the declaration need not itself be in writing. The signature must be that of the settlor himself and not that of his agent.

These requirements apply to express trusts only, and not to resulting, implied or constructive trusts.[20]

ii. Disposition. It is necessary to distinguish the creation of a trust from a *disposition* of an equitable interest.[21] Section 53 (1) (*c*) provides[22]:

> "A disposition of an equitable interest or trust subsisting at the time of the disposition must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will."

Little difficulty was experienced in applying this provision until the cases of *Grey* v. *I.R.C.*[23] and *Oughtred* v. *I.R.C.*[24] Each was concerned with a conveyancing technique intended to save stamp duty. Stamp duty is payable *ad valorem* upon a conveyance on sale

[16] Maitland, p. 56; Scott, *Law of Trusts*, Vol. 1, § 23.
[17] *M'Fadden* v. *Jenkyns* (1842) 1 Ph. 153.
[18] *Jones* v. *Lock* (1865) L.R. 1 Ch.App. 25; Nathan & Marshall, No. 35; *post*, p. 139.
[19] Replacing Statute of Frauds 1677, s. 7.
[20] s. 53 (2); *Bannister* v. *Bannister* [1948] 2 All E.R. 133; Nathan & Marshall, No. 23.
[21] *Timpson's Executors* v. *Yerbury* [1936] 1 K.B. 645 at p. 664 *per* Romer L.J.
[22] Re-enacting Statute of Frauds 1677, s. 9, with some alterations, the most significant one being that s. 9 applied to "all grants and assignments of any trust or confidence" while s. 53 (1) (*c*) applies to a "disposition of an equitable interest."
[23] [1960] A.C. 1; Nathan & Marshall, No. 20.
[24] [1960] A.C. 206; Nathan & Marshall, No. 21.

which includes "every instrument . . . whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction."[25] Stamp duty thus is imposed on instruments and not on transactions.[26] If a beneficial interest of value is transferred, the duty payable relates to the value of the interest.[27] If a bare legal estate is transferred the value is nil; and a nominal duty of 10s. is imposed.[27] The practice grew up whereby a settlor would establish a settlement of a nominal sum, say £100, which would be transferred to trustees to be held on the trusts of the settlement, no stamp duty being payable. Then he would convey the bare legal estate in the substance of the settlement to the trustees as his nominees without declaring any trusts. Subsequently the settlor would direct the trustees to hold the fund thereafter on the trusts of the settlement. Thus the creation of the trusts of the substantial part of the settlement would be effected without the use of a document transferring any valuable interest, and therefore without attracting *ad valorem* duty.

This practice was challenged by the Revenue in *Grey* v. *I.R.C.*[27a]

In addition to the oral declaration of trust by the settlor, the trustees subsequently executed deeds of declaration of trust, which the settlor also signed. It was admitted that, if these deeds were the effective instruments for the creation of the trusts, duty was payable. The settlor however argued that the trusts had been earlier and orally declared. The question was therefore whether the settlor's oral declaration of trust was a disposition within section 53 (1) (*c*). Before the oral declaration the trustees held the legal estate on trust for the settlor; the settlor now argued that he merely declared new trusts on which the trustees would hold the shares. The Revenue successfully contended that the beneficial interest had been in the settlor and that it moved from him to the beneficiaries, and that was a "disposition." The word "disposition" was construed in its normal meaning; the fact that this word replaced the phrase "grants and assignments" in the old Statute of Frauds[28] did not require that "disposition" should be given a similar meaning, for, although the Law of Property Act 1925 was a consolidating Act, it consolidated the Law of Property (Amendment) Act 1924, which was itself an amending Act.[29]

[25] Stamp Act 1891, s. 54 (F.A. 1963, s. 55 and Sched. 11, Part 1).
[26] *I.R.C.* v. *Angus* (1889) 23 Q.B.D. 579.
[27] Stamp Act 1891, Sched. 1.
[27a] [1960] A.C. 1; Nathan & Marshall, No. 20.
[28] s. 9; *supra*, note 22.
[29] [1960] A.C. 1 at pp. 13, 14.

There was no such easy way out in *Oughtred* v. *I.R.C.*[30]

Mrs. Oughtred was the owner of 72,700 shares in a company and also was tenant for life of a further 200,000 shares under a settlement with her son Peter entitled in remainder. In order to reduce the estate duty which would be payable on Mrs. Oughtred's death, Peter orally agreed to transfer to his mother his remainder interest in the 200,000 settled shares in consideration for Mrs. Oughtred's undertaking to transfer the 72,000 shares to him absolutely.[31] A deed of release was executed by Mrs. Oughtred and Peter, which recited that the 200,000 shares were then held in trust for Mrs. Oughtred, and the formal transfers to Mrs. Oughtred and to Peter were also executed. The question was whether *ad valorem* stamp duty was payable on the documents. The document selected for the purposes of the claim was the transfer of the shares to Mrs. Oughtred.

The question depended on whether or not Mrs. Oughtred was owner in equity of the shares before the formal transfer. She claimed so to be, by virtue of the contract; it was arguable that she undoubtedly became owner by virtue of her right to enforce the contract; or, putting the same point another way, that Peter, after the agreement, held the shares as constructive trustee for her.[32] The later document would then be only a formal transfer of the bare legal estate.

The House of Lords, however, by three to two, held to the contrary. For the majority, Lord Jenkins, with whose speech Lord Keith expressed entire agreement, concluded that Mrs. Oughtred's interest, after the agreement, was similar to that of a purchaser of land between contract and conveyance. The purchaser's interest "is no doubt a proprietary interest of a sort, which arises, so to speak, in anticipation of the execution of the transfer for which the purchaser is entitled to call. But its existence has never (so far as I know) been held to prevent a subsequent transfer, in performance of the contract, of the property contracted to be sold from constituting for stamp duty purposes a transfer on sale of the property in question."[33] So here, the transfer of the legal estate is nevertheless an instrument attracting duty. This decision leaves unanswered a number of questions relating to the nature of the interest which Mrs. Oughtred had before the legal transfer; the question is unlikely to arise in this form because the decision has established the liability to stamp duty of

[30] [1960] A.C. 206; Nathan & Marshall, No. 21.
[31] This device would not now be effective to avoid estate duty: F.A. 1958, s. 28.
[32] *Post*, pp. 234, 236.
[33] *Per* Lord Jenkins [1960] A.C. at p. 240.

the later transfer, and has deprived the scheme of the "pilot" settlement of its fiscal advantages.[34]

Section 53 (1) (*c*) was under consideration again in *Vandervell* v. *I.R.C.*[35]

> Shares held in trust for Mr. Vandervell were transferred by the trustees to the Royal College of Surgeons. For the purpose of establishing the liability of Mr. Vandervell to pay surtax on the income of the shares, it was material to know whether he had absolutely divested himself of all interest in the shares.[36] It was held that he had not; for reasons not relevant here. One unsuccessful argument for the Crown was that the trustees had conveyed only the legal estate; and that the equitable interest had not left Mr. Vandervell because there was no additional writing as required by section 53 (1) (*c*) to effect the disposition of the equitable interest. The House of Lords had no difficulty in holding that the subsection did not apply, for it "clearly refers to the disposition of an equitable interest as such. If, owning the entire estate, legal and beneficial, in a piece of property, and desiring to transfer that entire estate to another, I do so by means of a disposition which ex facie deals only with the legal estate, it would be ridiculous to argue that section 53 (1) (*c*) has not been complied with, and that therefore the legal estate alone has passed."[37]
>
> In *Re Tyler*[38] Pennycuick J. held that this section was complied with as a matter of form by a letter instructing a trustee to hold on trusts which had earlier been orally communicated. It was not necessary that the writing should contain particulars of the new trusts.

B. By Will

Additional formalities are required for the validity of a testamentary gift. Wills Act 1837, s. 9, provides:

> "No will shall be valid, unless it shall be in writing, and executed in manner herein-after mentioned: (that is to say) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time,

34 See [1960] B.T.R. 17 (J. G. Monroe); [1960] C.L.J. 31 (J. W. A. Thornley); Potter & Monroe, pp. 116–117.
35 [1967] 2 A.C. 291; Nathan & Marshall, No. 22.
36 I.T.A. 1952, s. 405.
37 *Per* Lord Donovan [1967] 2 A.C. at 317.
38 [1967] 1 W.L.R. 1269; *post*, p. 210.

and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

No attempt will be made here to deal with the many problems which have arisen from this enactment. Such treatment is more appropriate to a treatise on wills. Some questions will however be raised in Chapter 23 below on the administration of the estates of deceased persons.[39] The question of the validity of trusts taking effect on a testator's death which fail to comply with these provisions —the so-called "secret trusts"—will be discussed in Chapter 8.[40]

3. Certainty [41]

A. Certainty of Intention

We have already said that a trustee must be under an imperative obligation, but that the obligation may be inferred from the nature and manner of the gift, considered as a whole.[42] Technical words are not required. The question in each case is whether, on the proper construction of the words used, the settlor or testator has manifested an intention to create a trust.[43] An expression of hope or desire, or suggestion or request, is not sufficient. The words in each case must be examined to see whether the intention was to impose the obligation of a trust upon the donee. It is not surprising that, on such questions of construction, the courts have not always been consistent.

The Court of Chancery at one time leaned in favour of construing expressions of desire on the part of a testator as intended to create a binding trust.[44] The reason why the court would so readily find a trust appears to be that, according to the rule established by the Ecclesiastical Courts,[45] an executor who had administered an estate was entitled to keep for himself any surplus which was undisposed-of by the will. In 1830, however, the Executors Act provided that undisposed-of residue should be held on trust for the next-of-kin; and from about the middle of the 19th century, a stricter construction was placed upon expressions of this type, usually called "pre-

[39] *Post*, p. 443 *et seq.*
[40] *Post*, p. 155.
[41] See Lord Langdale in *Knight* v. *Knight* (1840) 3 Beav. 148 at p. 173.
[42] *Ante*, pp. 95, 96.
[43] *Ante*, p. 119.
[44] This tendency appears not to be in accordance with the views of Lord Nottingham; see *Cook* v. *Fountain* (1676) 3 Swan. 585; Nathan & Marshall, No. 17.
[45] Which exercised jurisdiction over the estates of deceased persons until 1858.

catory words." Where, however, an express trust is construed from precatory words, it is, of course, just as much a trust as any other.[46]

The older cases are therefore unhelpful as guides to construction. *Lambe* v. *Eames*[47] is usually regarded as the case which marks the "turning of the tide"; but the process was gradual and there is much overlapping between the decisions.[48]

In *Lambe* v. *Eames*,[47] the testator gave his estate to his widow "to be at her disposal in any way she may think best, for the benefit of herself and her family." By her will she gave part of the estate outside the family; it was held that she had been absolutely entitled to the property and that the gift was valid.

The matter is best summarised in the words of Lopes L.J. in *Re Hamilton*[49]: ". . . it seems to me perfectly clear that the current of decisions with regard to precatory trusts is now changed, and that the result of the change is this, that the court will not allow a precatory trust to be raised unless on the consideration of all the words employed it comes to the conclusion that it was the intention of the testator to create a trust."

In *Comiskey* v. *Bowring-Hanbury*,[50] a testator gave to his wife "the whole of my real and personal estate . . . in full confidence that she will make such use of it as I should have made myself and that at her death she will devise it to such one or more of my nieces as she may think fit and in default of any disposition by her thereof by her will . . . I hereby direct that all my estate and property acquired by her under this my will shall at her death be equally divided among the surviving said nieces." A majority of the House of Lords held that there was an intention in the testator to make a gift to his wife, with an executory gift over of the whole property at her death to such of her nieces as should survive her, shared according to the wife's will, and otherwise equally.[51]

46 In *Re Williams* [1897] 2 Ch. 12 at p. 27 Rigby L.J. protested against the use of the term "precatory trust," calling it a "misleading nickname"; Nathan & Marshall, No. 24.

47 (1871) L.R. 6 Ch.App. 597 at p. 599. James L.J. observed that to turn a widow into a trustee might be a "very cruel kindness indeed." This case was approved by the Court of Appeal in *Re Adams and the Kensington Vestry* (1884) 27 Ch.D. 394.

48 See *Curnick* v. *Tucker* (1874) L.R. 17 Eq. 320; *Le Marchant* v. *Le Marchant* (1874) L.R. 18 Eq. 414, for cases adopting the older approach; *cf. Re Diggles* (1888) 39 Ch.D. 253.

49 [1895] 2 Ch. 370 at p. 374.

50 [1905] A.C. 84.

51 Lord Lindley construed the limitation as showing an intention to give an absolute gift to the wife.

Where a form of words has once been held to create a trust, the testator's intention may be held to be such as to reach the same result, even though the words used, when subjected to the stricter modern construction, might be expected to produce a different result.[52] And if the gift is contained in a will and the precatory expression in a codicil, the inference in favour of a trust is much stronger than where the gift and the precatory words are contained in the same instrument.[53]

Where there is a gift to which certain words are attached which fail to create a trust, the gift takes effect as an absolute gift.[54] This situation must be distinguished from one in which the intention to establish a trust is clear, but the beneficiaries, for some reason, are unable to take; there is then a resulting trust.[55]

B. Certainty of Subject-Matter

The subject-matter may take many forms. It may be an interest in land, whether in possession or in remainder or in reversion; it may be chattels or money; it may be a chose in action, such as a promise [56] or a debt. Whatever form it takes, it must be specified. It is not sufficient for example to declare "the bulk of my estate," [57] or "such parts of my . . . estate as she shall not have sold," [58] or "all my other houses" [59]—*i.e.*, those remaining after a choice had been made by another beneficiary who died before choosing. But a gift to allow a beneficiary to "enjoy one of my flats during her lifetime and to receive a reasonable income from my other properties" [60] was upheld as sufficiently certain.

It is also necessary that property vested in trustees upon trust for several beneficiaries should be allocated among the beneficiaries or that a power be given to the trustees to determine its allocation at their discretion.

C. Certainty of Objects

i. Description of Beneficiary. The requirement of certainty of objects is stringent in the case of trusts. A trust (other than a

[52] *Re Steele's W.T.* [1948] Ch. 603; following *Shelley* v. *Shelley* (1868) L.R. 6 Eq. 540; (1968) 32 Conv.(N.S.) 361 (P. St. J. Langan).
[53] *Re Burley* [1910] 1 Ch. 215.
[54] *Lambe* v. *Eames* (1871) L.R. 6 Ch.App. 597; *Lassence* v. *Tierney* (1849) 1 Mac. & G. 551; *Hancock* v. *Watson* [1902] A.C. 14; Nathan & Marshall, No. 66; but see *Re Pugh's W.T.* [1967] 1 W.L.R. 1262.
[55] *Post*, p. 204.
[56] *Fletcher* v. *Fletcher* (1844) 4 Hare 67; Nathan & Marshall, No. 4; *post*, p. 145.
[57] *Palmer* v. *Simmonds* (1854) 2 Drew. 221.
[58] *Re Jones* [1898] 1 Ch. 438.
[59] *Boyce* v. *Boyce* (1849) 16 Sim. 476.
[60] *Re Golay's W.T.* [1965] 2 All E.R. 660.

charitable trust)[61] must be for ascertainable beneficiaries[62]; or, in the case of future interests, for beneficiaries who must be ascertainable within the period of perpetuity.[63] This is necessary because the trustees must know who are the beneficiaries; or, in the case where the trustees have a power of selection, who are the potential beneficiaries among whom they have to select. Further, if the trustees fail to execute the trust, the court will do so by implying a trust, in default of selection, among all the beneficiaries equally, and this could only be done if the beneficiaries can be ascertained.[64] The time at which the objects of the trust must be ascertainable is the time of the creation of the trust.[65]

> In *Re Ogden*,[66] a testator bequeathed a portion of his residuary estate to Sir Herbert Samuel, a leading Liberal politician of the day, "to be by him distributed among such political federations or bodies in the United Kingdom having as their objects or one of their objects, the promotion of Liberal principles in politics as he shall in his absolute discretion select and in such shares and proportions as he shall in the like discretion think fit." Lord Tomlin, sitting at first instance, held that this was a trust to distribute among a number of bodies which, when chosen, would take absolutely. As it was a trust, and not a mere power, its validity depended upon whether all the potential beneficiaries could be identified. Evidence was given by Sir Herbert Samuel to the effect that he could list all the institutions or organisations which qualified, and Lord Tomlin was satisfied that they could be identified and upheld the gift.
>
> *Re Ogden* was followed in *I.R.C.* v. *Broadway Cottages Trust*.[67]
>
> The Court of Appeal held void a trust for employees, both present and (within limits) future, of a number of persons and

[61] *Post*, p. 254. In the case of a trust for charitable purposes, there is no requirement of certainty as to which charitable purposes are to benefit; it is necessary, however, that the trust should be wholly for charitable purposes. Thus a gift for "charitable purposes" is sufficiently certain.

[62] *Re Wood* [1949] Ch. 498.

[63] *Leahy* v. *Att.-Gen. for N.S.W.* [1959] A.C. 457 at p. 484; Nathan & Marshall, No. 30; *Re Flavel's W.T.* [1969] 1 W.L.R. 444 at pp. 446–447.

[64] *Per* Jenkins L.J. in *I.R.C.* v. *Broadway Cottages Trust* [1955] Ch. 20 at p. 29; and *per* Cross J. in *Re Saxone Shoe Co.'s Trust Deed* [1962] 1 W.L.R. 943 at p. 952; *ante*, p. 97.

[65] *Re Hain's Settlement* [1961] 1 W.L.R. 440; *Re Gulbenkian's Settlements* [1968] 3 W.L.R. 1127 at p. 1138 *per* Lord Upjohn.

[66] [1933] Ch. 678; *Kilroy* v. *Parker* [1966] I.R. 309.

[67] [1955] Ch. 20; *Re Saxone Shoe Co. Ltd.'s Trust Deed, supra* at p. 943; *Re Hooper's Settlement* (1955) 34 A.T.C. 3; *Re Sayer* [1957] Ch. 423; *Re Eden* [1957] 1 W.L.R. 788; *Re Leek* [1969] 1 Ch. 563; *cf. Re Hain's Settlement* [1961] 1 W.L.R. 440, where the settlor unsuccessfully attempted to have his trust held void for uncertainty, and to produce a resulting trust in his own favour. The trust was in favour of "the children and remoter issue of the settlor and the past, present and future employees of the settlor." The settlor could not remember who they all were, but the Court of Appeal refused to find uncertainty.

companies together with their dependants. It was not possible to enumerate precisely every possible beneficiary under this trust. The objects were therefore uncertain and the trust failed.

Similarly, in *Re Leek*,[68] an arrangement between a managing director and a company which created a trust in favour of " wife, children or other issue or such other persons as the company may consider to have a moral claim upon you . . ." was held to be uncertain and void.[69]

After some variation in views, it is now fairly clear[70] that the onus is on those who allege the validity of the trust to show that its objects are certain, but they need only show certainty on the balance of probabilities. " All that is necessary is that the court should be satisfied that it is probable that the class can be or has been ascertained."[71] The test of certainty must be applied broadly. Inevitably, there are difficult and borderline cases, often dealing with " dependants " or " employees " or both. Suggestions have been made that where there is a trust in favour of objects, some of whom are sufficiently certain and some are not, the court should be enabled to strike out the offending part and uphold the rest.[72] There is no authority for so doing.

ii. Unincorporated Associations. Special problems arise in the application of these rules to the property of unincorporated associations. Not being incorporated, such an association does not have separate legal personality, and cannot itself own property. Its assets must be held by a body of trustees. The trusts applicable to those assets must comply with the rules relating to trusts, including the rule requiring certainty of objects. It is therefore necessary to establish who are the beneficiaries of trusts of this nature.

It is necessary to distinguish between two different types of unincorporated associations: those which are groups of persons united by some common tie and intending to exist as a group for some considerable time—*e.g.*, the members of the London Library; and those that exist for a particular purpose, *e.g.*, the National Anti-Vivisection Society. This latter type of association is really a purpose trust and will be discussed in Chapter 11.

[68] [1969] 1 Ch. 563.
[69] The rule of certainty in powers is much wider; *ante*, p. 105.
[70] *Re Saxone Shoe Co. Ltd.'s Trust Deed* [1962] 1 W.L.R. 943.
[71] *Per* Cross J. in *Re Saxone Shoe, etc., supra*, at p. 953.
[72] *Per* Sachs L.J. in *Re Leek* [1969] 1 Ch. 563 at p. 586. A similar question arises where some of the objects of a power are not described with sufficient certainty; *Re Gulbenkian's Settlements* [1968] Ch. 138, *per* Winn L.J. (C.A.).

If assets vested in the trustees of an unincorporated association can be divided amongst the members at any time, there is no difficulty in showing that there is a valid trust for an ascertainable number of individuals. But if the assets are held on trust not only for present but also for future members (unless restricted within the rule against perpetuities) then the trust does not comply with the requirement of certainty of objects. If this is to be valid, it must depend on some other principle for its validity.

It was at one time supposed that such a trust was valid if the trustees had power to spend the society's capital.[73] A society could then dispose of any of its assets at any time; there will be no more tendency to a perpetuity than in the case of an individual holding a fee simple, and, it was argued, no reason for invalidating it. If the trustees could spend only the income however—if, in other words, the trust was an endowment—the trusts on which the assets were held would be perpetual and void. This view appeared to have been approved by the House of Lords.[74] But the Privy Council in *Leahy* v. *Attorney-General for New South Wales*[75] took a contrary view.

> A gift was made to "such order of nuns of the Catholic Church or the Christian Brothers as my executors and trustees shall select." The gift was not valid as a charitable gift since possible beneficiaries were purely contemplative orders which are not charitable.[76] Nor was it valid as a gift to individual members of selected orders; the testator's intention clearly was to establish an endowment. The gift would have failed if it had not been rescued by a statute of New South Wales which permitted partly charitable trusts to be applied wholly in favour of those parts which were charitable. The trustees' power of selection did not therefore extend to contemplative orders.

The test is that of the right to claim a division by and among present members, or among those who must be ascertained within the period of perpetuity; and not the power of the trustees to spend the capital so as to prevent a trust of perpetual duration. No alternative validating principle has yet emerged.

Following this decision, gifts to unincorporated associations such as those we are now considering, will fall into one of three categories, as demonstrated by Cross J. in *Neville Estates* v. *Madden*.[77] Either

[73] *Re Drummond* [1914] 2 Ch. 90; *Re Patten* [1929] 2 Ch. 276; *Re Prevost* [1930] 2 Ch. 383; *Re Price* [1943] Ch. 422; (1937) 53 L.Q.R. 24, 46 (W. O. Hart).
[74] *Macaulay* v. *O'Donnell*, July 10, 1933; reported at [1943] Ch. 435n.
[75] [1959] A.C. 457; Nathan & Marshall, No. 30.
[76] *Post*, p. 263.
[77] [1962] Ch. 832 at p. 849. *Cf. Abbatt* v. *Treasury Solicitor* [1969] 1 All E.R. 52 at pp. 57–58, *per* Pennycuick J.

there will be a gift to the members at the relevant date as joint tenants, giving each a right of severance of his part; or a gift subject to the contractual rights and liabilities of the members towards each other, which prevent severance and cause a member's interest, on his death or resignation, to accrue to the remaining members; or a gift to present and future members, in which case the gift, unless confined to the perpetuity period, will be void. The second possibility reveals a workable solution but there are technical difficulties, such as the infancy of a member.[78] It has been suggested[79] that the problem is one of a specialised form of co-ownership, and that its rules should be worked out separately, as such, and not be dependent upon the law of trusts. A solution along these lines would be very welcome.

iii. Trusts for Persons and Purposes. It has been seen that a trust must have ascertainable beneficiaries and ascertainable subject-matter. There are however some trusts in which the beneficiaries enjoy only a limited proprietary interest. One such case arises where a debtor assigns assets to trustees for payment of his debts; his creditors do not, unless there has been an out and out assignment, take any surplus.[80] That such trusts are valid has never really been controverted, but their relation to general principle has rarely been discussed. In *Re The Trusts of the Abbott Fund*[81] for instance, it was accepted that a trust for the maintenance of two old ladies was valid although it was clear that no proprietary interest ever vested in them,[82] and in *Re Gillingham Bus Disaster Fund*[83] it was never suggested that disabled cadets for whom a fund was collected would ever be able to claim the assets of the fund as such. While it may be possible to support these latter decisions as examples of discretionary trusts, it may be preferable to regard them as examples of trusts for persons to be benefited only in a particular way, a category of trust expressly accepted as valid by Goff J. in *Re Denley's Trust Deed*.[84]

> A plot of land was conveyed to trustees to hold, within a period determined by lives, "for the purpose of a recreation or

[78] See the valuable discussion of these problems in Morris and Leach, pp. 313–318.
[79] Ford, *Unincorporated Non-Profit Associations*, Part 1, especially at pp. 5–8, 21–23.
[80] For an example, see the divergence in the Court of Appeal and House of Lords on the facts in *Smith* v. *Cooke* (1890) 45 Ch.D. 38; [1891] A.C. 297. Another and recent illustration of a trust constituted to benefit creditors only in a particular way is *Quistclose Investments Ltd.* v. *Rolls Razor Ltd.* [1968] 3 W.L.R. 1097; *ante*, p. 90.
[81] [1900] 2 Ch. 326; Nathan & Marshall, No. 61. *Post*, p. 206.
[82] See *Re Andrew's Trust* [1905] 2 Ch. 48 at p. 52.
[83] [1958] Ch. 300; Nathan & Marshall, No. 62. *Post*, p. 206. *Re Aberconway's S.T.* [1953] Ch. 647.
[84] [1969] 1 Ch. 373.

sports ground primarily for the benefit of the employees of the company and secondarily for the benefit of such other person or persons (if any) as the trustees may allow." A trust for non-charitable purposes is generally speaking void,[85] and this purpose was not charitable. Goff J. was able to construe this trust as a trust for the employees of the company, an ascertainable group of beneficiaries.[86] The employees could come to the court to ask for the enforcement of the trust, and the court could enforce the trust by ordering the trustees to allow the employees to use the land as a recreation ground. The trust was therefore held valid.

It seems therefore that the real objection is to trusts that are *only* for purposes not connected with beneficiaries,[87] and that the presence of a purpose in a trust is not fatal if there are *also* beneficiaries in the ordinary sense. This principle seems to provide a method whereby trusts for the education of ascertainable persons not wide enough as a group to constitute a section of the community for the purpose of the law of charitable trusts can be upheld as private trusts, though the trusts are only for the education of those persons.[88] It is not now necessary to construe the purpose as only a motive for the gift,[89] though it is also necessary to remember that a gift may be intended only as a gift for purposes (and so invalid unless charitable) although seeming at first sight to be a gift to persons.[90]

85 *Ante*, p. 86; *post*, p. 195 *et seq.*

86 Those secondarily interested took only under a power of defeasance, and did not invalidate the trust.

87 See *post*, p. 195. The ability of those entitled in default to come to court in a case of suspected maladministration is not sufficient to bring all purpose trusts within this area of validity.

88 Thus in *Re Compton* [1946] 1 All E.R. 117, and *Oppenheim* v. *Tobacco Securities Ltd.* [1951] A.C. 297, the trusts might have been valid private trusts if confined within the perpetuity period. See *post*, p. 256, note 30, and p. 260.

89 *Re Andrew's Trusts* [1905] 2 Ch. 48.

90 *Re Satterthwaite's W.T.* [1966] 1 W.L.R. 277.

Chapter 7

CONSTITUTION OF TRUSTS
EQUITY WILL NOT ASSIST A VOLUNTEER

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1. The General Problem

A. Requirements of Conveyance and Declaration

We have seen that the interest of the beneficiary under a trust is a proprietary interest.[1] The legal title is in the trustee; the equitable and beneficial title is in the beneficiary. The trust may be of any form of property—land, chattels, money, choses in action—and for any interest known to the law, whether legal or equitable, in possession, remainder [2] or reversion. A manifestation of an intention to create a trust is, as we have seen, one of the requirements for the creation of an express trust.[3] But it is not sufficient in itself. To declare that A is to hold Blackacre on trust for B does not create a trust unless Blackacre is conveyed to A. Similarly, a conveyance to A does not create a trust of Blackacre for B unless the trust is properly declared. In short, it is necessary both to declare the trust *and* to convey the property to the trustee.

[1] *Ante*, p. 16.
[2] *Re Ralli's W.T.* [1964] Ch. 288.
[3] *Ante*, p. 119.

This is self-evident. But many difficulties have been caused by failure to observe these basic propositions. And, even where they are observed, complications can arise. To pose a question: must the conveyance and the declaration be contemporaneous? If X conveys Blackacre to A to hold upon trust for B, a trust is created in favour of B; or if X conveys to A upon trust and later declares the trusts.[4] If X conveys Blackacre to A, can he then tell A to hold on trust for B? No; because after the conveyance A became the absolute owner. May the declaration precede the conveyance? May X create a trust for B by declaring that A is to hold on trust for B; and later convey Blackacre to A? This question raises a number of difficulties as we will see; they will be discussed in this chapter and also in Chapter 8.

B. Methods of Benefiting an Intended Donee

There are various ways in which an owner of property can benefit another person. If X is the owner at law and in equity, he can make B the beneficial owner in any one of three ways:

i. Outright Transfer. He can transfer legal and equitable ownership to B. In the case of land, this transaction is called a conveyance. With a chattel, it is called a sale or gift; with a chose in action, it is called an assignment, with shares it is usually called a transfer. Whatever type of transaction, X, by following the correct procedure appropriate to the type of property, can transfer his absolute interest, legal and equitable to B. The converse is almost too obvious to state: if X does not follow the correct procedure, he will not transfer the legal or beneficial interest to B. This self-evident proposition is stated here because arguments have unsuccessfully been raised to the effect that an attempted but unsuccessful transfer to B might be construed as a declaration of trust for B. It is not.[5]

ii. Transfer to Trustee. X may transfer the legal title in the property to A to hold on trust for B. Provided that the legal title is correctly transferred to A, according to the type of property concerned, A will become legal owner; and provided that an intention to create a trust in favour of B is correctly manifested, B will become equitable and beneficial owner. A holds on trust for B.

iii. Declaration of Self as Trustee. X may declare that he holds the property on trust for B. In this situation all that is necessary is a declaration of trust in favour of B. There is no problem of the

4 *Re Tyler* [1967] 1 W.L.R. 1269; Nathan & Marshall, No. 53; *Grey* v. *I.R.C.* [1960] A.C. 1; Nathan & Marshall, No. 20; *ante*, p. 120.
5 *Post*, pp. 138–140.

legal estate being vested in the trustee. It was, and remains, in X, who is the trustee, holding on trust for B. These three situations should be borne in mind in the discussion which follows.

C. Contracts to Convey or to Create a Trust

Situations (ii) and (iii) concern the creation of trusts in the strict sense. B in each case will obtain an equitable proprietary interest. In such a situation, it is immaterial whether B gave consideration or not. A gift confers title just as effectively as a sale.

If, however, the transaction in question had been ineffective to transfer the legal title from X to B in situation (i), what is B's position? If B gave no consideration there is nothing more that he can do; the gift fails, just as it would fail if a Christmas present were promised and not given. Equity will not assist a volunteer. But if B gave consideration, the position is different. B would be in a contractual relation with X, and could either sue X for damages for breach, or, in appropriate circumstances, obtain specific performance of the contract.[6] If B gave consideration for the promise by X to convey to A on trust for B—or, more realistically, for this question usually arises in connection with marriage settlements—if B is treated as being within the marriage consideration,[7] B can compel his trustee A to take proceedings against X, either to obtain the property or damages for breach, and to hold the property or the damages on the trusts declared. Thus, B, being treated as one who gave consideration and not as a volunteer, is entitled to enforce the promise; and, in accordance with the principle that equity considers as done that which ought to be done, may be treated as entitled in equity to the property which was the subject of the promise.

D. Absolute Beneficial Owner under a Trust

Reference should also be made here to the question of the way in which an absolute owner in equity (the legal title being in trustees) may benefit other persons; where, for example, trustees hold property on trust for B absolutely. We have seen that owners of property, intending to create trusts orally and thereby save stamp duty, would convey the legal estate to trustees, and then orally declare the trusts on which the property should be held. *Grey* v. *I.R.C.*[8] held such oral declarations of trusts to be void; Law of Property Act 1925, s. 53, must be complied with. The mechanics of such declarations are worth examination.

[6] *Ante*, pp. 35, 38–40.
[7] *Post*, pp. 140–141.
[8] [1960] A.C. 1; Nathan & Marshall, No. 20; *ante*, p. 120.

In a well-known statement in *Timpson's Executors* v. *Yerbury*,[9] Romer L.J. said: "Now the equitable interest in property in the hands of a trustee can be disposed of by the person entitled to it in favour of a third party in any one of four . . . ways. The person entitled to it (1) can assign it to the third party directly; (2) can direct the trustees to hold the property in trust for the third party (see *per* Sargant J. in *Re Chrimes*[10]); (3) can contract for valuable consideration to assign the equitable interest to him; or (4) can declare himself to be a trustee for him of such interest." Category (2), as Lord Evershed pointed out in *Grey* v. *I.R.C.*[11] "appears . . . to have been regarded as distinct from both an assignment, on the one hand, and a declaration of trust of the interest in the beneficial owner's hands, on the other."

If this method is properly regarded as distinct, the beneficial interest presumably returns to the trustees and then springs up again in the new beneficiaries. One may well then ask whether the trustees are not the appropriate persons to declare the trusts. The exact manoeuvring of the beneficial interest is nowhere explained. We know however that the whole operation is a "disposition" within Law of Property Act 1925, s. 53, according to the wide construction put upon that word by the House of Lords.[12] It appears however that the writing which is needed to validate the transaction need not include the names of the new beneficiaries.[13] And if the beneficial owner does not direct the trustees to hold the property on particular trusts, but authorises them to transfer the legal estate to donees, then the beneficial interest passes to the donees without express mention.[14]

It should also be noted that category (4) creates what is usually called a sub-trust: a situation in which A holds property on trust for B, and B declares himself to be trustee of his interest for C. Unless B has specific duties to perform, he is a bare trustee and drops out, the original trustee A holding on trust for C.[15]

2. Transfer of the Property to Trustees upon Trust

A. Legal Interests

The classic statement of the law relating to the requirement of a transfer of the property to trustees is that of Turner L.J. in *Milroy* v. *Lord*[16]:

[9] [1936] 1 K.B. 645 at p. 664; *Grey* v. *I.R.C.* [1958] Ch. 690 at p. 709 (C.A.).
[10] [1917] 1 Ch. 30.
[11] [1958] Ch. 690 at p. 709 (C.A.).
[12] *Grey* v. *I.R.C.* [1960] A.C. 1; Nathan & Marshall, No. 20; *ante*, p. 120.
[13] *Re Tyler* [1967] 1 W.L.R. 1269.
[14] *Vandervell* v. *I.R.C.* [1967] 2 A.C. 291; Nathan & Marshall, No. 22.
[15] *Grainge* v. *Wilberforce* (1889) 5 T.L.R. 436, *per* Chitty J. at p. 437.
[16] (1862) 4 De G.F. & J. 264 at pp. 274–275.

"I take the law of this court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this court to perfect an imperfect gift. The cases, I think, go further to this extent: that if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

The transfer to the trustees must accord with the rules applicable to the property concerned. Legal estates in land must be transferred by deed,[17] shares by the appropriate form of transfer,[18] equitable interests [19] and copyright [20] by writing, chattels by deed of gift or by an intention to give coupled with a delivery of possession,[21] a bill of exchange by endorsement.[22]

In *Milroy* v. *Lord* [23] a settlor had executed a deed purporting to transfer to a trustee some shares in the Louisiana Bank. Such shares could only be transferred by entry in the books of the bank; and no such transfer was made. The Court of Appeal in Chancery held that there was no trust, although the intention clearly was to benefit the intended beneficiary.

In *Paul* v. *Paul,*[24] the wife's property under a marriage settlement was transferred to the trustees to hold on the trusts

[17] L.P.A. 1925, s. 52 (1).
[18] See Companies Act 1948, s. 75, Sched. 1, Table A, paras. 22 & 23; Stock Transfer Act 1963, s. 1.
[19] L.P.A. 1925, s. 53 (1).
[20] Copyright Act 1956, s. 36 (3).
[21] *Ryall* v. *Rolls* (1750) 1 Ves.Sen. 348; *Irons* v. *Smallpiece* (1819) 2 B. & A. 551; *Cochrane* v. *Moore* (1890) 25 Q.B.D. 57; *Lock* v. *Heath* (1892) 8 T.L.R. 295; *Kilpin* v. *Ralley* [1892] 1 Q.B. 582; *Re Cole* [1964] Ch. 175.
[22] Bills of Exchange Act 1882, s. 31; *Whistler* v. *Forster* (1863) 14 C.B.(N.S.) 248; see, however, Cheques Act 1957, ss. 1, 2.
[23] (1862) 4 De G.F. & J. 264.
[24] (1882) 20 Ch.D. 742; *Jefferys* v. *Jefferys* (1841) Cr. & Ph. 138.

of the settlement. The trusts gave life interests to the wife and husband, with ultimate trusts in favour of the wife's next-of-kin. When it became clear that the spouses would not have issue, they attempted to claim the corpus of the fund, arguing that the next-of-kin were volunteers and that the trust in their favour was void. This argument failed because the trust for the next-of-kin was already constituted; the trusts were declared and the property was vested in the trustees. The fact that the next-of-kin were volunteers was immaterial. In other words, an equitable proprietary interest was already created in the next-of-kin, and neither the other parties interested nor the settlor could take it away from them.

In *Re Bowden*,[25] a settlor purported, before becoming a nun, to settle any property to which she might become entitled on her father's death. The property was later transferred to the trustees. Over 60 years later, she asked the trustees to transfer the property back to her on the ground that the settlement was a voluntary settlement of future property and void. Bennett J. held that the property, once transferred to the trustees, was bound by the trusts.

In *Re Ralli's Will Trusts*,[26] a testator left his residuary estate on trust for his wife for life and then for his two daughters Irene and Helen. Helen's marriage settlement included a covenant to settle after-acquired property in favour of (in the events which happened) volunteers. Helen died and then the widow died. The plaintiff was the sole surviving trustee both of the testator's will and also of Helen's marriage settlement. Buckley J. had to decide on what trusts the residue was held. He concluded, as a second ground for his decision, that the vesting of the property in the plaintiff was sufficient to constitute the trusts of the marriage settlement even though the property came to him in his other capacity as trustee of the will. "The circumstance that the plaintiff holds the fund because he was appointed a trustee of the will is irrelevant. He is at law the owner of the fund, and the means by which he became so have no effect upon the quality of his legal ownership."[27]

B. Equitable Interests

The same general principle applies where the settlor's interest is equitable. A correct transfer of the equitable interest to a trustee

[25] [1936] Ch. 71; similarly for voluntary covenants to settle: *Re Adlard* [1954] Ch. 29.
[26] [1964] Ch. 288.
[27] *Ibid.* at p. 301.

upon properly declared trusts is necessary to create a trust of that equitable interest. A disposition of an equitable interest must, as has been seen, be in writing.[28]

> In *Kekewich* v. *Manning*,[29] shares were held on trust for A for life and then for B. B assigned his equitable interest in remainder to trustees to hold on certain trusts, and this was held to create a trust of the equitable interest.

C. A Special Problem Relating to Shares

Legal title to shares in a company is transferable by a written document signed by the transferor, and followed by registration in the share register of the company.[30] If the transaction is for consideration, the purchaser becomes equitable owner of the shares from the date of the execution of the document of transfer, and is entitled to dividends declared after that date.[31]

The transfer of shares in a private company is restricted, and the Articles usually provide that the directors shall have power at their discretion to refuse to register the transfer. A difficult situation arises where a settlor makes a voluntary settlement of shares in such a company, executing a transfer which purports to transfer the shares to trustees to be held on the trusts of the settlement. The expectation is that the registration of the transfer will follow and the trust become constituted. The directors however may refuse to register the transfer. In that case, under the strict rule of *Milroy* v. *Lord*,[32] the trust will be incompletely constituted and a nullity. The validity of the trust would be dependent upon the uncontrollable discretion of the directors. And, even if they do register it, the date on which this happens may be crucial in determining liability to estate duty.[33]

> In *Re Rose*,[34] a settlor by voluntary deed transferred shares in a private company to trustees to be held on certain trusts. The directors, who had power to refuse to register transfers, registered this transfer some two months later. The deceased died at a time at which the shares would be treated as part of his estate for duty purposes if the date of the transfer were the date of registration; but would not be so treated if the date was

[28] L.P.A., s. 53 (1) (*c*); *ante*, p. 119.
[29] (1851) 1 De G.M. & G. 176; *Gilbert* v. *Overton* (1864) 2 H. & M. 110.
[30] See Companies Act 1948, s. 75, Sched. 1, Table A, paras. 22, 23; Stock Transfer Act 1963, s. 1.
[31] *Black* v. *Homersham* (1878) 4 Ex.D. 24; *Re Wimbush* [1940] Ch. 92.
[32] (1862) 4 De G.F. & J. 264.
[33] There is often a delay in the adjudication of *ad valorem* stamp duty in the case of transfers of shares of private companies and this may delay registration.
[34] [1952] Ch. 499; Nathan & Marshall, No. 34; *Re Fry* [1946] Ch. 312; *Re Rose* [1949] Ch. 78.

the date of the deed. The Court of Appeal held that the relevant date was that of the deed; for the settlor had at that time done everything possible to divest himself of the property. All that was needed in addition was the formal act of registration by the third party.

Evershed M.R. went so far as to say that after the execution of the transfer, the settlor held the shares as trustee for the beneficiaries.[35] He did not however give any convincing answer to the Crown's argument that, consistently with Turner L.J.'s judgment in *Milroy* v. *Lord*,[36] the transfer was either a valid transfer at law; or a declaration of trust; or it was ineffective. The settlor clearly did not intend to declare himself a trustee[37]; and would have been surprised to have been told that, if the directors had refused to register, he was unable to withdraw from the transfer because he was a trustee; and even more surprised to be held liable for breach of trust on the ground that the private company was not a trustee investment.[38] However that might be, the decision is eminently sensible on the facts of the case. It can be contrasted with *Re Fry*,[39] where the donor was domiciled abroad, and had not, at the critical time, done everything that was needed of him, as he had not obtained Treasury consent to the transfer.

3. Declaration of Self as Trustee

There is no difficulty in the way of a settlor who wishes to declare himself trustee of some or all of his property. All that is needed is a manifestation of an intention to declare a trust; or, if the property is land, evidence in writing of such intent. The settlor "need not use the words, 'I declare myself a trustee,' but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the Court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning."[40] It is necessary to show, not only an intention to benefit someone; but an intention to be trustee for that person. "Men often mean to give things to their kinsfolk, they

35 "If a man executes a document transferring all his equitable interest, say, in shares, that document, operating, and intended to operate, as a transfer, will give rise to and take effect as a trust; for the assignor will then be a trustee of the legal estate in the shares for the person in whose favour he has made an assignment of his beneficial interest." [1952] Ch. 499 at p. 510.

36 (1862) 4 De G.F. & J. 264.

37 *Jones* v. *Lock* (1865) L.R. 1 Ch.App. 25; Nathan & Marshall, No. 35.

38 *Post*, p. 317.

39 [1946] Ch. 312.

40 *Richards* v. *Delbridge* (1874) L.R. 18 Eq. 11 at p. 14 *per* Jessel M.R.

do not often mean to constitute themselves trustees. An imperfect gift is no declaration of trust." [41]

The issues which arise in this section are quite different from those discussed in section 2. There, the question was whether the property was vested in the trustee. Here, there is no such problem; if there is a trust the settlor is trustee. The question here is whether a trust has properly been declared. The problems in this section usually arise in cases where the settlor's intention was to make a gift to a donee but the gift failed, and the question is whether the intent to benefit the donee can be construed as a declaration of trust in his favour.

The rule is that equity will not construe a void gift as a declaration of trust. What is needed is an intention to declare a trust.

> In *Jones* v. *Lock*,[42] a father, being chided for failing to bring a present from Birmingham for his 9-month-old son, produced a £900 cheque payable to himself, saying: "Look you here, I give this to baby . . ." He gave it to the child, who was about to tear it up, and the father took it away and put it in an iron safe. The father died and the cheque was found among his effects.
>
> The question was whether the child was entitled to the cheque or whether it formed part of the father's estate. It would belong to the father unless he gave it to the child, or declared himself trustee of it. Clearly, he had not given it to the child, because a gift of a non-bearer cheque requires endorsement.[43] Had he declared himself trustee? No. He intended to give it to the child. But there was no evidence of the fact that he intended to declare himself trustee of it, and to burden himself with a trustee's duties in respect of it, including that of investing it in trustee securities, and being personally liable for failure to do so. There was no such intention here; nor was there an effective gift; the child took nothing.[44]
>
> Similarly in *Richards* v. *Delbridge*,[45] a grandfather, who was entitled to leasehold premises on which he carried on business, endorsed on the lease a memorandum as follows: "This deed and all thereto belonging I give to R [who was an infant] from this time forth, with all my stock-in-trade." He delivered the document to R's mother, and then died, making no mention of

[41] Maitland, p. 72.
[42] (1865) L.R. 1 Ch.App. 25; Nathan & Marshall, No. 35.
[43] Under the Cheques Act 1957, s. 2, indorsements in blank of cheques payable to order are no longer necessary so far as the rights of a collecting bank are concerned.
[44] *Cf. Re Rose* [1952] Ch. 499; Nathan & Marshall, No. 34; *ante*, p. 137.
[45] (1874) L.R. 18 Eq. 11; Nathan & Marshall, No. 36.

> the property in his will. Jessel M.R. held that no interest passed; not at law, because the endorsement was ineffective to assign a lease; and not in equity, for the words were inappropriate for the declaration of a trust.

However, in *Middleton* v. *Pollock,*[46] there was evidence in a memorandum of the declaration of trust.

> A client had placed in the hands of her solicitor a sum of money for investment. The solicitor did not invest the money, and died insolvent. Among his papers was a written declaration of trust in the client's favour of certain leaseholds and other property. Jessel M.R. held that there was a valid declaration of trust in favour of the client. The evidence here was clear. Whether or not, in any case, the evidence is sufficient will depend on the facts of the case; it has been held that the intent can be implied from conduct where the evidence is clear.[47]

It will be noted that it is not necessary that the beneficiary should be aware of the declaration of trust.[48] The beneficiary becomes equitable owner just as he would become legal owner if the property had been transferred by conveyance *inter vivos.*

4. Covenants to Settle

If a settlor has neither conveyed the property to trustees nor declared himself a trustee, no trust is created. If he has covenanted to settle the property, the crucial question is whether or not the intended beneficiary can compel him to carry out the covenant and settle it. A beneficiary who has given consideration can do so by obtaining specific performance of the covenant; one who has not given consideration cannot do so. Equity will not assist a volunteer.

For this purpose, " consideration " has a wider meaning than that which it bears at common law. The term includes everything which would be included by the common law[49]; but equity also treats as having given consideration, in the case of a covenant in a marriage settlement, the husband and wife and issue of the marriage.[50] They

46 (1876) 2 Ch.D. 104.
47 *Gee* v. *Liddell* (1866) 35 Beav. 621; *New, Prance and Garrard's Trustee* v. *Hunting* [1897] 2 Q.B. 19.
48 *Middleton* v. *Pollock* (1876) 2 Ch.D. 104; *Standing* v. *Bowring* (1885) 31 Ch.D. 282.
49 Anson, *Law of Contract* (21st ed.), Chap. 3; Cheshire and Fifoot, *The Law of Contract* (7th ed.), Part II, Chap. II; Treitel, *The Law of Contract* (2nd ed.), Chap. 3.
50 *Harvey* v. *Ashley* (1748) 3 Atk. 607 at p. 610; *Hill* v. *Gomme* (1839) 5 Myl. & Cr. 250 at p. 254; *De Mestre* v. *West* [1891] A.C. 264; *Att.-Gen.* v. *Jacobs-Smith* [1895] 2 Q.B. 341.

are said to be "within the marriage consideration."[51] It is not clear whether the "issue" of the marriage refers only to children or includes more remote issue.[52] It seems, however, that illegitimate children, children by a former marriage, and children to whom one of the parties stands *in loco parentis*, cannot be included unless their interests are so closely intertwined with those of the natural issue of the marriage that the latter may be said to take only on terms which admit the former to a participation with them.[53]

> In *Pullan* v. *Koe*,[54] a marriage settlement of 1859 settled property on trusts in favour of husband and wife and prospective children, and also contained a covenant by the wife to settle on the same trusts any property she later acquired of the value of £100 and upwards. In 1879 the wife received £285, part of which was used for her own purposes and part invested in bearer bonds, which remained at the bank in the husband's name until his death in 1909. The question was whether the trustees could then take steps to obtain the bonds from his executors and hold them on the trusts of the settlement.
>
> Swinfen Eady J. held that it was the duty of the trustees to enforce the covenant on behalf of those who were within the marriage consideration. Indeed, the wife and children could have taken action themselves if the trustees had refused to do so. Here, however, the common law action on the covenant was barred by the lapse of time; but the court held that the £285 was impressed with the trust at the moment the wife received it, and that the trust could be enforced against the bonds.

Such a covenant would not however be enforceable in favour of next-of-kin, for they are volunteers.[55] Thus, if a marriage settlement contained a similar covenant to settle after-acquired property, and there were no children of the marriage, there is no way in which the husband and wife could be prevented from ignoring the covenant and keeping after-acquired property for themselves. The next-of-kin, or other persons who take in default of children, will not be able to enforce the covenant. It was however suggested in one case that the

[51] This is so whether the settlement is made on the marriage, or made before but in consideration of the marriage, or a post-nuptial settlement in pursuance of an ante-nuptial agreement.

[52] *MacDonald* v. *Scott* [1893] A.C. 642 at p. 650 *per* Lord Herschell.

[53] See *Att.-Gen.* v. *Jacobs-Smith* [1895] 2 Q.B. 341; *Rennell* v. *I.R.C.* [1962] Ch. 329 at p. 341 *per* Lord Evershed M.R., affd. [1964] A.C. 173; *Re Cook's S.T.* [1965] Ch. 902 at p. 914. F.A. 1963, s. 53, defines gifts in consideration of marriage in more exclusive terms for the purposes of estate duty. See also F.A. 1968, s. 36.

[54] [1913] 1 Ch. 9.

[55] *Re D'Angibau* (1880) 15 Ch.D. 228; *Re Plumptre's Marriage Settlement* [1910] 1 Ch. 609; *Re Cook's S.T.* [1965] Ch. 902.

wife could not keep both her interest under the settlement and also the after-acquired property, but should be put to her election.[56] It is doubtful whether the doctrine of election would be applied so generally.

Where the covenant is enforced by persons within the marriage consideration, the court may order the covenantor to settle the property in accordance with the covenant; or, as in *Pullan* v. *Koe*,[57] declare that the property is subject to the trusts of the settlement. However where one of the intended beneficiaries is a party to the covenant, even though a volunteer, there is no reason why an action on the covenant for damages should not be brought.

In *Cannon* v. *Hartley*,[58] a settlement upon a separation, to which the spouses and a daughter were parties, provided that a sum of money should be paid by the father to the daughter. He failed to make the payment. The daughter was a volunteer; she could not take advantage of the rule about marriage consideration because the settlement was not one made in consideration of marriage. She could however sue upon her father's covenant under seal, and recover damages for breach of covenant.

5. Action for Damages by the Trustees. Trusts of Choses in Action

There is no special difficulty in enforcing a trust of a chose in action.[59] Where a contractual right is held by A on trust for B, A may sue and obtain damages or a decree of specific performance on behalf of B[60]; or B may obtain such relief on his own account if A refuses to act, joining A as a co-defendant in the action.[61]

It may well be asked why this doctrine is not applied to assist a volunteer in the case of a covenant to settle after-acquired property.[62] If a husband or wife covenants with a trustee A to settle after-acquired property in favour of the children of the marriage, and in default in favour of the next-of-kin, we have seen that the next-of-kin, being volunteers, are unable to sue on the covenant.[63] Could

[56] *Re Vardon's Trusts* (1885) 31 Ch.D. 275; *post*, p. 484.
[57] [1913] 1 Ch. 9; *ante*, p. 141.
[58] [1949] Ch. 213.
[59] *Ante*, p. 131.
[60] *Lloyd's* v. *Harper* (1880) 16 Ch.D. 290.
[61] *Les Affréteurs Réunis Société Anonyme* v. *Leopold Walford Ltd.* [1919] A.C. 801.
[62] *i.e.*, a covenant to settle property which might come subsequently to one of the beneficiaries under a settlement. It was common in a marriage settlement for each of the spouses to covenant to add to the trusts of the settlement any property which they subsequently might acquire.
[63] *Supra*, p. 141. *Re D'Angibau* (1880) 15 Ch.D. 228; *Re Plumptre's Marriage Settlement* [1910] 1 Ch. 609; *Re Cook's S.T.* [1965] Ch. 902.

not the trustees sue, recover damages, and hold them in trust for the next-of-kin? [64] Or could not the next-of-kin argue that there is already a completely constituted trust of the promise, a trust of a chose in action of which they are the beneficiaries, and thus entitled to enforce? [65]

Recent developments have given volunteers no comfort in this respect. In *Re Pryce*,[66] Eve J. held that the trustees should not be compelled to pursue whatever remedy they may have at law on the covenant, and in *Re Kay's Settlement*,[67] Simonds J. decided that they should be instructed not to do so; and in *Re Cook's Settlement Trusts*,[68] Buckley J. distinguished *Fletcher* v. *Fletcher*,[69] *Williamson* v. *Codrington* [70] and *Re Cavendish-Browne's Settlement Trusts*,[71] and refused to allow volunteers to enforce a covenant even though another person had given consideration. These however are all decisions of courts of first instance, and the matter should be analysed more closely.

A. Suit by the Trustees

There are two main difficulties which lie in the way of trustees who sue to recover damages with a view to holding the money received on trust for the (volunteer) beneficiaries.

i. Decision to Enforce. The trustee would be left with the decision whether or not to enforce the trust. It is true that many discretions may be left to trustees.[72] But, as we have seen, a trust necessarily involves a duty on the trustees to administer the trust in some way; to give the trustee, as a party to the covenant, the right to decide whether or not anything shall be done for any of the beneficiaries is not consistent with his office of trustee.[73]

ii. Nominal or Substantial Damages. It cannot be readily assumed that the trustee would recover substantial damages in an

[64] (1960) 76 L.Q.R. 100 (D. W. Elliott).
[65] (1962) 78 L.Q.R. 228 (J. A. Hornby); *Perspectives of Law* (ed. R. Pound), p. 239; (1969) 85 L.Q.R. 213 (W. A. Lee).
[66] [1917] 1 Ch. 234.
[67] [1939] Ch. 329.
[68] [1965] Ch. 902; [1965] C.L.J. 46 (G. H. Jones); *cf. Beswick* v. *Beswick* [1968] A.C. 58, *ante*, p. 55.
[69] (1844) 4 Hare 67.
[70] (1750) 1 Ves.Sen. 511.
[71] [1916] W.N. 341.
[72] *Post*, Chap. 10 and pp. 293, 308.
[73] *Post*, p. 293; definitions of a trust include an element of compulsion; *ante*, p. 85; *Fowler* v. *Garlike* (1830) 1 Russ. & M. 232; *Re Beloved Wilkes' Charity* (1851) 3 Mac. & G. 440; *Gisborne* v. *Gisborne* (1877) 2 App.Cas. 300; *Re Raven* [1915] 1 Ch. 673; *cf.* the problem in relation to purpose trusts, *post*, p. 200.

action at law on the covenant. If he can recover only nominal damages, the action will be of no help to the beneficiary.[74]

It is said that " for breach of a covenant to pay a certain sum the measure of damages (if that is the appropriate expression) is the certain sum; and for breach of a covenant to transfer property worth a certain sum, it is the value of the property." [75] There is no doubt that this is the usual rule; and in the normal case, such measure of recovery coincides with the actual loss to the covenantee.[76] That is not necessarily decisive of an action brought by a trustee of an incompletely constituted trust, on which question there is little authority. Of the cases usually quoted on this question, *Re Cavendish-Browne's Settlement Trusts* [77] is most clearly in point.

The covenantor was absolutely entitled to a share of unconverted real estate in Canada, which he entered into a voluntary covenant to settle. The trustees sued for damages and were awarded a sum equivalent to the value of the property which would have come into their hands if the covenant had been performed, and this money was to be held on the trusts of the settlement.

Thus there is some authority for the rule that a covenantee may recover substantial damages for breach of a covenant to pay money or transfer specific property, even though he has suffered no loss personally. It may be noted in passing that, even if this is right, it will not affect cases like *Re Pryce* [78] and *Re Kay's Settlement*,[79] for the covenant in each of those cases was not to pay a sum of money or to transfer specific property, but to transfer after-acquired property to the covenantee. It is questionable whether the *Cavendish-Browne* rule is a satisfactory one. An automatic right to recovery of substantial damages by the covenantee would preclude the covenantor from taking the point that the intended trust was for some reason void. If there is a covenant to settle property on what are intended to be charitable trusts, it is surprising that the settlor is unable to escape liability on the covenant if he shows that the trusts are not charitable; or, in the case of a private trust, that the trusts are void (or even illegal) or that all possible beneficiaries are dead. It is a strange rule that will allow the covenantee to recover damages in such circumstances; there are no beneficiaries, and the covenantee

[74] See [1950] C.L.P. 30 at p. 43 (O. R. Marshall).
[75] (1960) 76 L.Q.R. 100 at p. 112 (D. W. Elliott).
[76] *Cannon* v. *Hartley* [1949] Ch. 213; *Synge* v. *Synge* [1894] 1 Q.B. 466.
[77] [1916] W.N. 341; (1916) 61 S.J. 27; *Re Parkin* [1892] 3 Ch. 510 and *Ward* v. *Audland* (1847) 16 M. & W. 863 are, it is submitted, distinguishable: *Perspectives of Law* (ed. R. Pound), p. 243.
[78] [1917] 1 Ch. 234.
[79] [1939] Ch. 329. In this case and in *Re Pryce*, *supra*, it was assumed that the trustees, if they sued at law, would recover substantial damages.

must either keep the money for himself or hold it on resulting trust for the person from whom he has just recovered it. If a case like *Re Cavendish-Browne*[80] is distinguished from such situations on the ground that there were valid trusts on which the money, once received by the covenantee, could be held, then it is the interest of the beneficiaries which is critical in permitting the covenantee to recover; yet this cannot be the case, for, by definition, the interests of the beneficiaries are not in existence until the money is vested in the trustees. For the beneficiaries to have an interest before that time, it would be necessary to show that there was a trust of the promise.

B. Trust of the Promise

Whether or not a promise is held upon trust depends upon the intention of the settlor. The ascertainment of the intention has proved to be particularly difficult in these situations[81]; and the cases show considerable divergence.

The critical case on trusts of promises is the well-known case of *Fletcher* v. *Fletcher*,[82] a decision which presents certain difficulties, and one which is often misunderstood.

> Ellis Fletcher entered into a voluntary covenant with trustees to pay to them £60,000 to be held on trust, in the events which happened, for his natural son Jacob. The trustees did not wish to accept the trust or to receive the money unless they were required by the court to do so. Vice-Chancellor Wigram held that Jacob was able to claim the money, saying that equity would either allow Jacob to use the name of the trustee to sue at law, or to recover in his own name in a court of equity.

Wigram V.-C. was of course fully aware of the rule forbidding aid being given to a volunteer, and this argument was pressed upon him. "According to the authorities, I cannot, I admit, do anything to perfect the liability of the author of the trust, if it is not already perfect. The covenantor is liable at law, and the Court is not called upon to do any act to perfect it. One question made in argument has been whether there can be a trust of a covenant the benefit of which shall belong to a third party; but I cannot think that there is any difficulty in that . . . The proposition, therefore, that in no case

[80] [1916] W.N. 341; (1916) 61 S.J. 27.
[81] *Re Engelbach's Estate* [1924] 2 Ch. 348; *Vandepitte* v. *Preferred Accident Insurance Corp. of New York* [1933] A.C. 70; *Re Schebsman* [1944] Ch. 83; *Green* v. *Russell* [1959] 2 Q.B. 266; *Scruttons Ltd.* v. *Midland Silicones Ltd.* [1962] A.C. 446; *Beswick* v. *Beswick* [1968] A.C. 58; Tiley, p. 82.
[82] (1844) 4 Hare 67; Nathan & Marshall, No. 4.

can there be a trust of a covenant is too large, and the real question is whether the relation of trustee and *cestui que trust* is established in the present case." [83]

There was, then, a trust of the promise, and the plaintiff, as beneficiary of the trust, could enforce it. But there are one or two difficulties in holding that a trust of a chose in action was created on the facts of this particular case. In the first place, positive evidence of intention is lacking. Ellis Fletcher, the covenantor, covenanted that he would pay the £60,000 to trustees "to be held on the following trusts." There is clearly a trust which will affect the money once it is received by the trustee, but no manifestation of an intention by either party to create a trust of a chose in action. Secondly, a trust of this nature should be created, if at all, by the obligee and not by the obligor; and there was evidence of the fact that the trustee did not enter into the arrangement intending to be a trustee of a promise, for he did not know about it, and wished to decline the trust as soon as he did hear about it. A trust of tangible property is declared by the owner of the property, whether he keeps the property himself or transfers it to another on trust; a trust of a debt is declared by the creditor. A covenantor should not claim, at one swoop, to burden himself with the promise of the payment of money to a promisee, and impose trusts upon the promisee behind his back. It is not as if he were assigning the benefit of a promise, or transferring the money; in such cases he could of course impose trusts on the promise or on the money. The logic of the matter seems to be that if A covenants to pay money to B which B is to hold on trust for C, the trusts on which money will be held, when paid over, can be declared by A; but a trust of A's promise should be declared by the person who has the benefit of the promise, namely B; and this will usually be proved by showing that B covenanted as trustee for the persons nominated by the covenantor.[84]

C. Specific Performance at the Suit of the Contracting Party

Beswick v. *Beswick* [85] suggests the possibility of a new approach to this problem. If the administratrix of old Mr. Beswick could in that case obtain specific performance against young Mr. Beswick and compel him to perform his promise to make payments to the widow Beswick (a volunteer), can it not be argued that the trustees in a

[83] *Ibid.* at p. 74.

[84] *The Restatement of Trusts*, para. 26, states that "in the absence of evidence of a different intention, the inference is that the promisee immediately becomes trustee of his rights under the promise."

[85] [1968] A.C. 58; Tiley, p. 82; *ante*, p. 55 *et seq.*

marriage settlement situation should be able to obtain specific performance of the promise to settle after-acquired property in favour of volunteers? At least in *Beswick* v. *Beswick* [85] the House of Lords saw no objection to a solution which permitted the widow to obtain by this indirect method what she could not obtain directly [86]; Simonds J. in *Re Kay's Settlement* [87] had taken the opposite view.

It is submitted however that the principle of *Beswick* v. *Beswick* [85] does not apply to the case of voluntary covenants. In that case, old Mr. Beswick (A) gave consideration for the promise of young Mr. Beswick (B). He had a right of action for damages against B *in respect of his own loss.* When the loss was shown to be nil, and the damages therefore nominal, specific performance became available instead. In the case of a voluntary covenant to pay to trustees there is no possibility of loss; nominal damages are automatically adequate compensation, and there is no room for the argument that specific performance should be available in lieu. "This in-between stage of the inability to do justice to A in damages is vital to the establishment of the equity . . . (otherwise) the equity, in effect, would be C's and not A's." [88] Nor, it is submitted, would the introduction of a nominal consideration to the marriage settlement make any difference. "If a settlement is in its nature voluntary, it will not be made less so in the eyes of Equity because it is expressed to be made in consideration of the sum of five shillings." [89] We saw also that it made no difference in *Re Cook's Settlement Trusts* [90] that one of the parties had given consideration.[91]

In *Re Cook's Settlement Trusts*,[90] F, on a resettlement of the family capital, covenanted with H, his father, and the trustees that he would pay to the trustees any money received from any sale of some valuable pictures owned absolutely by F. The beneficiaries under the settlement were volunteers, and Buckley J. held that the trustees were unable to insist on the performance of the covenant.

The decision preceded *Beswick* v. *Beswick*,[92] in which it was apparently not cited. A similarity between the two cases appears on close analysis. H entered into a contract for consideration with F, one of the terms of which was that F would confer a benefit on

[86] *Per* Lord Pearce [1968] A.C. 58 at p. 89.
[87] [1939] Ch. 329 at p. 342.
[88] *Annual Survey of Commonwealth Law* [1968], p. 389 (J. D. Davies).
[89] (1966) 8 Malaya L.R. 153 at p. 158 (M. Scott).
[90] [1965] Ch. 902.
[91] *Ante*, p. 143.
[92] [1968] A.C. 58; Tiley, p. 82.

X. If H had sued F, could he succeed, as in *Beswick* v. *Beswick*,[93] by saying that the damages awardable for the breach were inadequate, and that specific performance of the covenant to pay should be decreed in favour of X? The covenant was under seal in *Re Cook's Settlement Trusts*[94]; but this should not be a bar. And the covenant was not in terms to pay to the volunteers, but to the trustees, who would hold the money in trust for them; but this seems immaterial. It is H who, on this reasoning, could sue and not the trustees; but the action should not be dependent upon H's physical survival, for his estate, on the reasoning of *Beswick*, should be able to do so.

It was however suggested in *Coulls* v. *Bagot's Trustee*[95] that where the covenantor's promise is made both to H (who gave the consideration) *and* to X (the volunteer), *both of whom* are parties to the contract or covenant, X can sue on the covenant by joining H (irrespective of H's wishes) although X has provided no consideration.

These developments are relevant to the context of *Re Kay*[96] and the marriage settlement cases. In the case of a covenant in a marriage settlement to settle after-acquired property, the settlor, or his estate after his death, having provided consideration, and being a party to the transaction, may, on the authority of *Beswick* v. *Beswick*,[93] be able to obtain specific performance for the benefit of the volunteers. The dictum in *Coulls*[97] if accepted, would allow the trustees to enforce the covenant. Neither case has relevance to the *Fletcher* v. *Fletcher*[98] type of situation, where the question is whether the settlor can be compelled to provide the funds originally promised to the trustees. The effect of these cases in the context of marriage and other settlements is speculative; but it will be advisable to draft settlements with the possibility of making use of these cases in mind. Without their assistance we return to the most basic question of all in relation to the creation of trusts: whether the settlor has manifested an intention to create a trust. There is little doubt that the courts apply a stricter test for the discovery of an intention to create a trust of a promise than they did in Jacob Fletcher's day. This is not surprising, for *Milroy* v. *Lord*,[99] *Jones* v. *Lock*,[1] *Tweddle* v. *Atkinson*[2] and other cases following them were

93 [1968] A.C. 58; Tiley, p. 82.
94 [1965] Ch. 902.
95 (1967) 40 A.L.J.R. 471 at p. 477 *per* Barwick C.J.
96 [1939] Ch. 329.
97 (1967) 40 A.L.J.R. 471 at p. 477.
98 (1844) 4 Hare 67; Nathan & Marshall, No. 4.
99 (1862) 4 De G.F. & J. 264.
1 (1865) L.R. 1 Ch.App. 25; Nathan & Marshall, No. 35.
2 (1861) 1 B. & S. 393; Nathan & Marshall, No. 3.

decided subsequently. An application of the present stricter test would, as explained above, exclude the existence of the necessary intent in *Fletcher* v. *Fletcher* [3]; an application of an easier test would produce a different answer to the series of cases on covenants to settle after-acquired property.

D. Summary

The proper solution to this question, it is submitted, is dependent upon the question of policy, whether the covenantor should or should not be made to implement his undertaking on behalf of the volunteers. If it is thought that he should, the means are at hand, whether by finding a trust of the promise, or by allowing specific performance of the covenant. But if it is thought that he should not, cases like *Re Kay's Settlement* [4] must stand; they are at least consistent with the established rules requiring strict construction of expressions of intention to create trusts, and of the older principles relating to the availability of specific performance.

6. Trusts of Future Property

Trusts of property which the settlor will receive in the future give rise to a number of questions. And it is hoped to show in this section, as in the previous one, that everything depends upon the intention of the settlor and the rules which are applicable for the ascertainment of his intention.

A contract for consideration to convey future property to trustees upon trust is valid [5] and, in most cases, specifically enforceable.[6] A gratuitous covenant under seal to convey property to trustees is actionable at the instance of the beneficiary, if the court finds, on a proper construction of the situation, that the promisee became trustee of the promise for the beneficiaries.[7] A purported assignment of an expectancy cannot be a conveyance because there is nothing to convey. If consideration is given for the purported conveyance, it will be construed as a contract to assign and enforceable as such.[8] But if it is made gratuitously it is a nullity.[9]

In *Re Ellenborough*,[10] the sister of Lord Ellenborough purported to convey by voluntary settlement the property which

[3] (1844) 4 Hare 67; Nathan & Marshall, No. 4.
[4] [1939] Ch. 329.
[5] *Re Lind* [1915] 2 Ch. 345; *Re Gillott's Settlement* [1934] Ch. 97; *Re Haynes' W.T.* [1949] Ch. 5.
[6] *Pullan* v. *Koe* [1913] 1 Ch. 9.
[7] *Fletcher* v. *Fletcher* (1844) 4 Hare 67; Nathan & Marshall, No. 4.
[8] *Re Burton's Settlement* [1955] Ch. 82; Tiley, p. 328.
[9] *Meek* v. *Kettlewell* (1842) 1 Hare 464; *Re Ellenborough* [1903] 1 Ch. 697; *Re Brooks' S.T.* [1939] Ch. 993; *Williams* v. *C.I.R.* [1964] N.Z.L.R. 996.
[10] [1903] 1 Ch. 697; *Cf. Re Bowden* [1936] Ch. 71; *Re Adlard* [1954] Ch. 29, *ante*, p. 136.

she would receive under her brother's will. On his death she declined to transfer the property to the trustees, and Buckley J. held that the trustees could not compel her to do so.

The question is whether such a gratuitous covenant or assignment in respect of future property can ever be effective as a declaration of trust, so that the trust will become effective when the property vests in the trustee. The situation can arise if the property, on falling in, is transferred to trustees without a further declaration of the trusts, or where the property vests in the settlor after he has declared the trusts on which he is to hold it.

We have seen that a covenant in a marriage settlement to settle after-acquired property is not enforceable at the suit of the next-of-kin because they are volunteers [11]; and it is clear that a deed purporting to grant future property upon trust is ineffective.[12] But if, in either of these cases, the property found its way into the hands of the trustees, it would presumably be held upon the trusts declared in the relevant documents.[13] If the settlor, in either case, conveyed the property to the trustees, that action could be construed as a further declaration of the trusts; but if the property reached the trustees by another route, being conveyed perhaps by the executors of the testator from whom the property came,[14] or coming into the hands of the trustee in a different capacity,[15] the possibility of finding that there was a further declaration of trust is less strong. There appear to be three possible solutions to such a case: that the trustees take beneficially, that they hold on trust for the settlor, or that they hold on the trusts declared in the previous document. The first is obviously unsatisfactory. The second involves the proposition that the settlor could claim back in equity property which he had covenanted or purported to settle. The third avoids the necessity of making the ultimate destination of the property depend upon the route by which it reached the trustees; it is consistent with the expressed intention of the parties and appears to be the most satisfactory solution.[16]

Where the property comes to the settlor himself, it is possible for the court to hold that a previous declaration of trust, followed by the vesting of the property in himself as trustee, constitutes the trust. The question is whether he will be treated as making the declaration

[11] *Re D'Angibau* (1880) 15 Ch.D. 228; *Re Plumptre's Settlement* [1910] 1 Ch. 609.
[12] *Re Ellenborough* [1903] 1 Ch. 697; *Re Brooks' S.T.* [1939] Ch. 993.
[13] In *Re Ellenborough*, *supra*, Miss Emily Towry Law had already handed over to the trustees the property which she received under her sister's will; and no attempt was made to recover it; *Re Adlard* [1954] Ch. 29; *Re Ralli's W.T.* [1964] Ch. 288.
[14] *Re Adlard* [1954] Ch. 29.
[15] *Re Ralli's W.T.* [1964] Ch. 288.
[16] So held in *Re Ralli's W.T.*, *supra*, discussed *ante*, p. 136.

at the moment he receives the property.[17] It is clear that a previous declaration is not of itself sufficient [18]; subsequent confirmation of a previous declaration is sufficient.[19] In less obvious cases it is no doubt a question of construction to determine whether or not the settlor is to be taken to have made a subsequent declaration or to have affirmed a previous one. If he made the declaration every day, the last declaration being made the moment before he received the property, this would no doubt be sufficient. But in the absence of authority, it is unsafe to predict to what extent an argument on these lines might be acceptable. What is clear in these cases is that the beneficiaries must show that the trust was properly declared and properly constituted. In connection with the declaration, there are again very difficult points of construction, the solution of which will largely depend on the view the court takes on the policy question whether or not trusts ought to be created in this way. There appears to be nothing intrinsically wrong in holding that the declaration of a trust may precede its constitution.

7. Exceptions to the Rule that Equity will not Assist a Volunteer

A. The Rule in Strong v. Bird

A continuing intention to release a debt, or make an immediate gift, coupled with the vesting of the property in the debtor or intended donee as executor,[20] or administrator,[20a] is treated as a complete gift.

> In *Strong* v. *Bird*,[20] B borrowed £1,000 from A, his step-mother, who lived in his house, paying £212 10s. a quarter for board, and it was agreed that the debt should be paid off by a deduction of £100 from each quarter's payment. Deductions of this amount were made for two quarters; but on the third quarter-day, A paid the full amount. She continued to do so to the time of her death, some four years later. B was appointed her sole executor, and proved the will. Later A's next-of-kin claimed for the balance of the debt. It was held that the appointment of B as executor released the debt.

It is necessary to show an intention in the testator to make an immediate *inter vivos* gift, and also a continuing intention to the

[17] *Restatement of Trusts*, para. 26, comments *k* and *l*; para. 86, comment *c*.
[18] *Matter of Gurlitz*, 105 Misc. 30, 172 N.Y. Supp. 523 (1918); *Brennan* v. *Morphett* (1908) 6 C.L.R. 22; *Permanent Trustee Co.* v. *Scales* (1930) 30 S.R.(N.S.W.) 391 at p. 393; *Williams* v. *C.I.R.* [1964] N.Z.L.R. 996.
[19] *Re Northcliffe* [1925] Ch. 651.
[20] (1874) L.R. 18 Eq. 315.
[20a] *Re James* [1935] Ch. 449.

date of his death. Thus, an intention to make a testamentary gift is not sufficient.[21] And an executor will fail if the testator, subsequently to the act on which the executor relies as establishing the intention to give a chattel, acted inconsistently with that intention by giving or lending the chattel to someone else,[22] or if the testator, having once had an intention to give, forgot the gift, and treated the property as his own.[23]

B. Donatio Mortis Causa

i. The Principle. A *donatio mortis causa* is a form of conditional gift which becomes absolute on the death of the donor, and is not required to observe the usual formalities for testamentary gifts. A man who realises the imminence of death, may wish to make a gift of property to a donee on condition that, in the unlikely event of his recovery, the gift may be revoked. By this doctrine, a volunteer may be assisted by equity to make absolute, on the donor's death, what had been conditional before.

The close resemblance of the English to the Roman law in this field may be seen from *Cain* v. *Moon*,[24] where Lord Russell C.J. pointed out that for an effectual *donatio mortis causa* three things must combine:

(a) the gift must have been in contemplation, though not necessarily in the expectation of death [25];

(b) the subject-matter of the gift must have been delivered to the donee [26];

(c) the gift must have been made under such circumstances as to show that the property is to revert to the donor if he should recover.[27]

ii. Contemplation of Death. As long as the donor can be shown to have contemplated death at the time of the gift, the title of the donee will not be invalidated if he actually dies from some disease other than that from which he was suffering. Thus in *Wilkes* v. *Allington* [28] the donor was suffering from an incurable disease, and made a gift in the knowledge that he had not long to live; as things

21 *Re Stewart* [1908] 2 Ch. 251; *Re Innes* [1910] Ch. 188.

22 *Re Freeland* [1952] Ch. 110.

23 *Re Wale* [1956] 1 W.L.R. 1346.

24 [1896] 2 Q.B. 283. In this case the delivery had already taken place at a previous time; this delivery was treated as equally effectual for passing the property, the intention being clear. The situation was comparable to that of a *traditio brevi manu* in Roman law; Inst. 2.1.44.

25 *Wilkes* v. *Allington* [1931] 2 Ch. 104.

26 *Cain* v. *Moon* [1896] 2 Q.B. 283.

27 *Re Lillingston* [1952] 2 All E.R. 184.

28 [1931] 2 Ch. 104. A valid *donatio mortis causa* cannot be made in contemplation of suicide; *Re Dudman* [1925] Ch. 553.

turned out, he had an even shorter time than he imagined, for he died two months later of pneumonia. It was held that the gift remained valid.

iii. Necessity for Delivery. A *donatio mortis causa* will not be valid without a delivery of the property to the donee or the means of getting control over its subject-matter.[29] In the case of a chose in action the donor must hand over such documents as constitute the essential evidence of his title to the chose in action.[30] Thus in *Re Weston*[31] it was held that where the dying man could be shown to have handed over to his fiancée his Post Office Savings Bank book, his action was sufficient to constitute an effective *donatio mortis causa* of the balance recorded in the book.

iv. The Intention of the Donor. Sometimes if the intention is clear, equity will assist the donee even though the delivery has been insufficient. The principle laid down by Lord Eldon in *Duffield* v. *Elwes*[32] was that, where the intention of the donor to pass the property to the donee can be clearly shown, the intended donee could apply to a court of equity, who would compel the donor's representatives to perfect the gift. "The principle of not assisting a volunteer to perfect an incomplete gift does not apply to a *donatio mortis causa*."[33]

C. Modifications by the 1925 Legislation

Two statutory exceptions arise and, for the sake of completeness, must be mentioned, although their real significance is in respect of the machinery of the 1925 legislation relating to the settlement of land, rather than to the present topic.

i. Settled Land Act 1925, s. 27. A conveyance (whether it is for value or not) which purports to convey a legal estate to an infant[34] operates as an agreement for valuable consideration to execute a settlement in favour of the infant, and in the meantime to hold the land in trust for the infant.[35]

[29] See *Ward* v. *Turner* (1752) 2 Ves.Sen. 431; *Re Wasserberg* [1915] 1 Ch. 195; *Re Lillingston* [1952] 2 All E.R. 184; *Re Cole* [1964] Ch. 175; *Re Mustapha* (1891) 8 T.L.R. 160; *Re Craven's Estate* [1937] Ch. 423, 427.

[30] *Birch* v. *Treasury Solicitor* [1951] Ch. 298; Tiley, p. 191; *cf. Re Weston* [1902] 1 Ch. 680; *Delgoffe* v. *Fader* [1939] Ch. 922.

[31] [1902] 1 Ch. 680; *Re Ward* [1946] 2 All E.R. 206.

[32] (1827) 1 Bli.(N.S.) 497; Tiley, p. 190.

[33] *Per* Lindley M.R. in *Re Dillon* (1890) 44 Ch.D. 76 at p. 83; *cf. per* Sargant J. in *Re Wasserberg* [1915] 1 Ch. 195 at p. 205.

[34] Who is incapable of holding a legal estate; L.P.A. 1925, s. 1 (6). See Family Law Reform Act 1969, ss. 1, 10.

[35] S.L.A. 1925, s. 27 (1).

ii. Settled Land Act 1925, s. 9. In various situations in which a settlement is inadequately created for lack of a vesting deed,[36] the most significant of which is that of an instrument *inter vivos* intended to create a settlement which does not comply with the requirements of the Settled Land Act 1925, the trustees may, and on the request of the tenant for life or statutory owner shall, execute a principal vesting deed for the purpose of perfecting the settlement.[37]

D. Estoppel

It has long been settled that estoppel works as a shield and not as a sword.[38] In other words, where one person has been led to act to his detriment in reliance upon the statement of another, he can prevent that other person from acting inconsistently with his statement. If A encourages or permits B to build a house on A's land and B does so at his own expense, A will not be permitted to claim the land as his own and turn out B.

The proper solution of the relationship between the parties is complex. If we say that B can claim the land, this places him in the same position as if he had contracted to purchase; but there was no agreement, and B is a volunteer. To say that what is built on A's land belongs to A is to do an obvious injustice to B. There are many possible solutions, which are discussed below.[39] The matter is mentioned here for the purpose of recording that there are various dicta and some decisions to the effect that B can obtain positive relief and can claim the land.[40] It is submitted that the application of such an extreme rule involves an over-simplification of the problem and is inconsistent with a proper understanding of the doctrine of estoppel.

[36] S.L.A. 1925, s. 9 (1).
[37] S.L.A. 1925, s. 9 (2).
[38] *Combe* v. *Combe* [1951] 2 K.B. 215; (1952) 15 M.L.R. 1 (Denning L.J.); *cf.* (1965) 81 L.Q.R. 84, 223 (D. C. Jackson).
[39] *Post*, p. 681; (1956) 20 Conv.(N.S.) 281 (R. H. Maudsley); (1963) 79 L.Q.R. 238 (D. E. Allan); *Raffaele* v. *Raffaele* [1962] W.A.R. 29; (1965) 81 L.Q.R. 84, 223 (D. C. Jackson); (1968) 32 Conv.(N.S.) 96 (R. E. Poole).
[40] *Dillwyn* v. *Llewellyn* (1862) 4 De G.F. & J. 517; *Duke of Beaufort* v. *Patrick* (1853) 17 Beav. 60; *Plimmer* v. *Wellington Corp.* (1884) 9 App.Cas. 699; *Bannister* v. *Bannister* [1948] 2 All E.R. 133; Nathan & Marshall, No. 23; *Thomas* v. *Thomas* [1956] N.Z.L.R. 785; *Chalmers* v. *Pardoe* [1963] 1 W.L.R. 677; *Ward* v. *Kirkland* [1967] Ch. 194.

CHAPTER 8

TESTAMENTARY GIFTS NOT COMPLYING WITH THE WILLS ACT 1837. SECRET TRUSTS [1]

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1. GENERAL

WE have seen that certain formalities are necessary for the creation of *inter vivos* trusts of land and for testamentary dispositions. A trust of land must be evidenced in writing [2]; and all testamentary dispositions must be in writing and signed at the foot by the testator, in the presence of two or more attesting witnesses.[3] We now have to consider the effect of intended dispositions of these types which fail to comply with the necessary formalities. The insistence on formality was intended to prevent fraud [4]; what should equity do where an intended trustee fraudulently shelters behind the provisions of the statutes? Where, for example, a transferee procures the conveyance of land to him by means of an oral promise to hold on trust for a third party? Or a legatee or devisee persuades the testator to make a will in his favour in reliance on a similar oral promise? Or an heir similarly persuades the intending testator not to make a will at all?

Equity, where possible, will not permit a statute to be a cloak

[1] (1947) 12 Conv.(N.S.) 28 (J. G. Fleming); (1951) 67 L.Q.R. 314 (L. A. Sheridan); (1963) 27 Conv.(N.S.) 92 (J. A. Andrews).
[2] L.P.A., s. 53 (1) (*b*); *ante*, p. 119.
[3] Wills Act 1837, s. 9; *ante*, p. 122; there are exceptions for wills made by members of the forces in actual military service or mariners or seamen in similar circumstances; see Halsbury, Vol. 39, pp. 883–885. As to mental patients, see Administration of Justice Bill 1969, cls. 17–19.
[4] See (1927) 43 L.Q.R. 1.

for fraud.[5] However, a statute is a statute, and all courts must obey it. The question therefore is whether or not equity can, by acting *in personam* against the fraudulent party, prevent the fraud without disregarding the statute. If A conveys land to B on an oral trust for C, and B fraudulently claims the land for himself, how can equity interfere? Clearly, by operating *in personam* against B to deprive him of the benefit. Should the beneficial interest then be enjoyed by C, or held on a resulting trust for A? A resulting trust for A is all that is necessary to prevent B's unjust enrichment by his fraud; to give the beneficial interest to C looks perilously like a disregard of the statute. The rule appears however to be that B will be compelled to hold on trust for C.[6] The case of a conveyance by A to B on an oral trust for A is a simpler one, for by preventing B taking the beneficial interest, the effect will be to require him to hold on trust for A.[7] The problem appears more commonly with wills than with conveyances *inter vivos*. In the case of wills, it is more complicated; for the alternative solution of a resulting trust for the settlor is less satisfactory; in the *inter vivos* case the settlor can think again; with a will he is dead, and a resulting trust for the residuary estate is often what the testator most wished to avoid.

There may be many reasons why a testator wishes to be secret about his testamentary dispositions. In many of the older cases, the reason was that he wished to make a gift to support an illegitimate child and its mother; to include the gift in the will would be embarrassing. At the present day, the usual reason is that the testator cannot make up his mind upon all the details of the disposition of his estate. By using a secret trust, he is able to escape from the policy of the Wills Act, and to retain for himself a power to make future gifts which do not comply with the formalities required by the Act. It is also common to make a settlement *inter vivos* and then, by will, to add further property to the settlement. The details of the disposition do not then appear in the will; but this is not a proper case of a secret trust, but of incorporating the other document into the will by reference.

To create a secret trust the testator will usually arrange to leave a legacy to a trusted friend (often his solicitor) who undertakes to hold it upon certain trusts; or he may give it to him "to be held upon such trusts as I have declared to him." The question in the

[5] *Davies* v. *Otty* (1865) 35 Beav. 208; *McCormick* v. *Grogan* (1869) L.R. 4 H.L. 82; *Rochefoucauld* v. *Boustead* [1897] 1 Ch. 196; *Bannister* v. *Bannister* [1948] 2 All E.R. 133; Nathan & Marshall, No. 23; a related jurisdiction is that which gave rise to the doctrine of part performance.

[6] *Taylor* v. *Salmon* (1838) 4 Myl. & Cr. 134; *Rochefoucauld* v. *Boustead* [1897] 1 Ch. 196; (1915) 28 H.L.R. 237, 366 (G. P. Costigan).

[7] *Davies* v. *Otty* (1865) 35 Beav. 208; *Bannister* v. *Bannister* [1948] 2 All E.R. 133; Nathan & Marshall, No. 23.

former case is whether the friend could keep the legacy for himself; if not, and clearly in the latter case he cannot, who can claim it: the intended beneficiaries, or the estate?

Different considerations apply to these two situations, as will be seen. The former case is known as a fully secret trust; the latter a half- or semi-secret trust.

2. Other Methods of Informal Disposition on Death

Before attempting to answer these questions in the context of secret trusts, it is necessary to mention two other ways in which a testator may establish a trust which is to take effect on his death without spelling out the terms of the trust in his will.

A. Incorporation by Reference [8]

"If a testator, in a testamentary paper duly executed, refers to an existing unattested testamentary paper, the instrument so referred to becomes part of his will; in other words it is incorporated into it; but it is clear that, in order that the informal document should be incorporated in the validly executed document, the latter must refer to the former as a written instrument then existing—that is at the time of execution—in such terms that it may be ascertained." [9] It is not sufficient that the document was in existence; it must be *referred to as an existing document.* If therefore it is a future document at the date of the will, but in existence at the date of a codicil, it is not saved by the rule that a later codicil republishes the will.[10] Where the doctrine of incorporation applies, the incorporated document is admitted to probate, and the advantage of secrecy is lost. We will see that this doctrine appears to be in the minds of some judges when they are dealing with cases of secret trusts, and that the rules of this doctrine have sometimes been applied to secret trust cases.

B. Facts of Independent Legal Significance

A testator may make valid dispositions although the identification of the beneficiaries or of the property must be determined by extrinsic evidence. Thus a gift to my valet, or to the chauffeur of X; or of the contents of a bank account, or of the furniture in a particular room is identifiable only by inquiry. The details of the

[8] *Allen* v. *Maddock* (1858) 11 Moo.P.C.C. 427; *In bonis Smart* [1902] P. 238; Tiley, p. 411; *Re Jones* [1942] Ch. 328; *Re Edwards' W.T.* [1948] Ch. 440; Tiley, p. 412; *Re Schintz's W.T.* [1951] Ch. 870; *Re Tyler* [1967] 1 W.L.R. 1269.
[9] *Per* Gorell-Barnes J. in *In bonis Smart* [1902] P. 238 at p. 240; Tiley, p. 411.
[10] *Ibid.* at p. 241.

disposition do not appear in the will; and the disposition will vary with changes which take place in the class of beneficiaries or in the location of the property.

However there are limits. A testator may not make a disposition in favour of the persons whose names appear in an unattested paper, or of such property as shall be indicated to them. The distinction is difficult to draw precisely. There is little English material on the point; but the American rule is that such a disposition is valid if it can be ascertained from facts which have significance apart from their effect upon the disposition in the will.[11] If the facts (as with the unattested paper) have no independent legal significance, the disposition will be void.

C. Gift to Trustees of an Existing Settlement

It is common practice to make a bequest to trustees of an existing settlement to be held by them upon the trusts of that settlement. There is no difficulty in doing so if the existing settlement is incorporated by reference in the will. In such a situation a subsequent variation by the court of the terms of the settlement, as on a divorce, or presumably under the Variation of Trusts Act 1958, does not affect the trusts of the bequest.[12]

However, the doctrine of incorporation by reference is incapable of meeting a situation in which the settlement is subject to a power of revocation or amendment,[13] even though the trust remains unaltered and unrevoked up to the death of the testator. The possibility that the trusts may change precludes the possibility of it being incorporated as a document existing at the date of the will; this would enable the testator to reserve for himself a power to dispose of his property by a future unattested document. Such a situation, as Lord Greene M.R. said, may lead a testator "into a trap because he failed to direct his mind to the provisions of the Wills Act."[14] It is clear that the courts where possible will adopt a construction which will uphold a disposition of this type.[15]

The difficulty could be overcome by applying to this situation a doctrine such as that discussed under **B**. If the *inter vivos* settlement has independent legal significance, the testator would be able, in this situation, as in others, to make a disposition the details of which need not be spelled out in the will; and the technicalities of the doctrine of incorporation by reference would no longer be

11 Scott, *Law of Trusts*, § 54 (2).
12 *Re Gooch* [1929] 1 Ch. 740.
13 *Re Jones* [1942] Ch. 328; *Re Edwards' W.T.* [1948] Ch. 440; *Re Schintz's W.T.* [1951] Ch. 870.
14 *Re Edwards' W.T., supra*, at p. 445.
15 *Re Edwards' W.T., supra*; *Re Schintz's W.T., supra.*

troublesome. This rule would not conflict with *Re Jones*,[16] for it appears that no property had been transferred to the trustees of the *inter vivos* settlement, which therefore had no independent legal significance.

In that situation, the fact that the settlement might be altered would be immaterial. If it were altered, questions then arise whether the testamentary dispositions would be held on the original terms, or on those operative at the death of the testator. These questions have recently been under examination in the U.S.A. and Canada.[17] The Uniform Testamentary Additions to Trusts Act 1960, now adopted in nineteen States, provides, subject to a contrary expression of intention by the testator, that the testamentary disposition shall become part of the settlement and that it shall be disposed of in accordance with any amendments made to the trusts existing at the date of the testator's death.

This may well seem to be a considerable new departure from English law. However, the need for some doctrine more acceptable than that of incorporation by reference is shown by *Re Jones*,[18] *Re Edwards' Will Trusts*[19] and *Re Schintz's Will Trusts*.[20] In some situations, as we have seen, a testator is able to make some testamentary dispositions without spelling out all the details, and *Re Playfair*[21] suggests that some such doctrine is in operation, though unrecognised.[22]

In *Re Playfair*,[21] the testator bequeathed £20,000 to trustees to be held on the trusts of an irrevocable marriage settlement. The testator's son, who had a vested interest under the marriage settlement, predeceased the testator. The question was whether his estate took the bequest. It would do so if the bequest formed an addition to the funds of the marriage settlement; but it would lapse if it were a testamentary gift on the trusts declared in the marriage settlement[23]—as it would be if the settlement were incorporated by reference into the will. It was held that the bequest was an addition to the funds of the marriage settlement and that the son's estate was entitled.

[16] [1942] Ch. 328.
[17] Report of the Ontario Law Commission Relating to Testamentary Additions to Trusts; Appendix U to the Proceedings of the 49th Meeting of the Conference of Commissioners of Uniformity of Legislation in Canada (1967).
[18] [1942] Ch. 328.
[19] [1948] Ch. 440.
[20] [1951] Ch. 870.
[21] [1951] Ch. 4.
[22] See also *Berchtoldt* v. *Hertford* (1844) 7 Beav. 172; *Ford* v. *Buxton* (1844) 1 Coll. N.C. 403; *Re Palmer* (1858) 3 H. & N. 26; *Re Finch & Chew's Contract* [1903] 2 Ch. 486; *Re Beaumont* [1913] 1 Ch. 325; *Re Powell* [1918] 1 Ch. 407.
[23] See *Jarman on Wills* (8th ed.), Chap. XIV.

It is important that the matter should be analysed and developed. Admittedly, the reservation to the settlor of a power of revocation and amendment is rare in England, for tax reasons.[24] But it is common for testators to make dispositions to trustees of discretionary trusts, or trusts where the trustees have such wide powers of appointment that the whole trusts might be changed. There is a danger that the incorporation of such a document might be caught by the principle of *Re Jones*.[25] It is not of course the testator who is technically given the right to effect the course of disposition by unattested document; but a word in the trustee's ear prior to death could produce the same effect. As far as is known, this problem has not yet been faced; it will be well to have a rational answer when it comes.

3. Trusts Uncommunicated During the Testator's Lifetime Cannot be Enforced

We have seen that testamentary dispositions are void unless they comply with the formalities required by the Wills Act.[26] A gift is "testamentary" if it is one which takes effect only upon the death of the testator; until the testator dies, there is no gift; a will may be changed, destroyed, or revoked by the testator at any time before his death. Thus a gift "to X when I die" is a testamentary gift and is void unless it observes the proper formalities; and in any case may be revoked at any time before death. But a gift to myself for life and then to X is a gift *inter vivos* restricting the donor's present interest to a life interest and giving X a present interest in remainder. This gift is irrevocable.[27] The formalities for validity are those applicable to *inter vivos* gifts.[28]

Once a gift is effectively made, it is impossible for the donor to take it back, or to impress trusts upon it. It follows that, after the gift in the case of *inter vivos* transactions, and after death in the case of a gift by will, there is no way in which the donor or testator can impose trusts upon the property. If a testator by his will leaves property to X absolutely, this absolute ownership vests in X by virtue of the gift[29]; and it is not possible to reduce X to the status of a trustee. A note in the testator's hand, found among his papers,

[24] I.T.A. 1952, s. 404.
[25] [1942] Ch. 328.
[26] 1837, s. 9; *ante*, p. 122; for *donationes mortis causa*, see *ante*, p. 152.
[27] Unless expressly made revocable.
[28] *Ante*, p. 132.
[29] After the administration of the estate; *ante*, p. 90 *et seq*.

but not executed as a will and not incorporated with it,[30] is not effective to impose a trust upon the property.[31]

4. Fully Secret Trusts

A. Informal Disclosure of the Existence and the Terms of the Trust

Where, however, a testator makes a gift by will to a legatee in reliance upon the legatee's express or implied [32] undertaking to hold the property upon certain trusts, it would be fraudulent for the legatee to take advantage of the absence of the necessary formalities and to keep the property for himself.[33] The doctrine applies also where the deceased failed to revoke an existing gift,[34] or revoked a codicil so as to revive a previous testamentary gift,[35] or where an intestate, in reliance on the undertaking of those entitled on intestacy, failed to make a will.[36] "It is altogether immaterial whether the promise is made before or after the execution of the will, that being a revocable instrument." [37]

The fraud in the legatee or intestate successor prevents his taking the property beneficially. The next step however is not so obvious. As explained above equity will not permit a statute to be a cloak for fraud; but equity cannot disregard a statute, nor can the courts "give the go-by" to it.[38] In such a situation the fraud could be prevented by compelling the recipient of the property to hold as trustee; and to hold the property on trust for the estate. In these cases however, the rule is that the secret trust in favour of the secret beneficiary is enforced.[39]

The cases on fully secret trusts have usually assumed that it is the fraud of the legatee that brings about this result. Lord Hatherley L.C. and Lord Westbury were emphatic in *McCormick* v. *Grogan*,[40]

[30] *Re Louis* (1916) 32 T.L.R. 313 ("to have a drink or smoke with Louis every day").

[31] *Wallgrave* v. *Tebbs* (1855) 2 K. & J. 313; Nathan & Marshall, No. 68; *McCormick* v. *Grogan* (1869) L.R. 4 H.L. 82; *Re Boyes* (1884) 26 Ch.D. 531; *Re Hawkesley's Settlement* [1934] Ch. 384.

[32] "Asquiescence either by words of consent or by silence": *per* Wood V.-C. in *Moss* v. *Cooper* (1861) 1 J. & H. 352 at p. 366; Nathan & Marshall, No. 69. The communication may be by the testator or by his agent.

[33] *Drakeford* v. *Wilks* (1747) 3 Atk. 539; Nathan & Marshall, No. 67; *Stickland* v. *Aldridge* (1804) 9 Ves.Jr. 516; *Wallgrave* v. *Tebbs* (1855) 2 K. & J. 313 at p. 320; Nathan & Marshall, No. 68.

[34] *Chamberlaine* v. *Chamberlaine* (1678) Free.Ch. 34; *Moss* v. *Cooper*, *supra*.

[35] *Tharp* v. *Tharp* [1916] 1 Ch. 142; [1916] 2 Ch. 205.

[36] *Stickland* v. *Aldridge*, *supra*, at p. 519; 12 Conv.(N.S.) 28 (J. G. Fleming).

[37] *Per* Wood V.-C. in *Moss* v. *Cooper* (1861) 1 J. & H. 352 at p. 367; Nathan & Marshall, No. 69.

[38] *Re Pitt-Rivers* [1902] 1 Ch. 403 at p. 407; *Blackwell* v. *Blackwell* [1929] A.C. 318 at p. 337.

[39] See Scott, *Law of Trusts*, § 55 (1).

[40] (1869) L.R. 4 H.L. 82.

although the House of Lords held in that case that the testator had not intended to impose an obligation on Grogan, the sole executor, and that there was therefore no trust. Of the doctrine, Lord Hatherley said[41]: "It is in itself a doctrine which involves a wide departure from the policy which induced the Legislature to pass the Statute of Frauds, and it is only in clear cases of fraud that this doctrine has been applied—cases in which the court has been persuaded that there has been a fraudulent inducement held out on the part of the apparent beneficiary in order to lead the testator to confide to him the duty which he so undertook to perform." Lord Westbury spoke of[42] "the jurisdiction founded altogether on personal fraud. It is a jurisdiction by which a Court of Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by the fraud." We will see when discussing the theoretical basis of the doctrine that this emphasis on fraud, while perhaps acceptable in cases of fully secret trusts, is inadequate in the case of half-secret trusts.[43]

B. Disclosure to the Legatee of the Existence of the Trust but not its Terms

If the testator discloses to the legatee the fact that he is to hold the legacy on trust, but does not disclose the terms of the trust before his death, the legatee will hold on trust for the estate. As indicated above, such a solution is sufficient in all cases to prevent fraud by the legatee.

In *Re Boyes*,[44] a legacy was given to the testator's solicitor, who undertook to hold the property according to directions which he would receive by letter. The letter was found only after the death. The solicitor accepted that he held as trustee, and wished to carry out the trust. Kay J. held in favour of the next-of-kin; placing the secret trust cases on rather a different basis from that of Lord Hatherley: "The essence of all those decisions is that the devisee or legatee accepts a particular trust which thereupon becomes binding upon him, and which it would be a fraud in him not to carry into effect."[45]

A further point must be mentioned. This situation is similar to that of half-secret trusts. But there is an important difference. In *Re Boyes*,[46] the gift was absolute on its face; the trust could have

41 *Ibid.* at p. 89.
42 *Ibid.* at p. 97.
43 *i.e.*, where the will in terms gives the property to a person as trustee without disclosing what the terms of the trust are. *Post*, p. 167.
44 (1884) 26 Ch.D. 531; *Re Hawkesley's Settlement* [1934] Ch. 384.
45 *Ibid.* at p. 536.
46 (1884) 26 Ch.D. 531.

been enforced if the terms had been declared before death.[47] Where the existence of a trust is disclosed on the face of the will, the communication, as we shall see, must be prior to or contemporaneously with the execution of the will.[48]

C. Methods of Communication

We have seen that the trust must be communicated before the testator's death. The communication may be orally or in writing[49]; and it appears that, just as "a ship which sails under sealed orders, is sailing under orders though the exact terms are not ascertained by the captain until later,"[50] a testator may, during his lifetime, give to the legatee a sealed envelope which is not to be opened until the testator's death.

D. Additions to the Trust

A testator must communicate not only the trust and the terms, but also the identity of the property to be held on trust.

In *Re Colin Cooper*,[51] the testator left £5,000 to legatees upon secret trusts which were disclosed to them. By a later codicil he purported to increase the sum to be devoted to the secret trust to £10,000. It was held that though the first instalment could be devoted to the secret trusts the latter could not.

E. Tenants in Common and Joint Tenants

Where a gift is made to legatees as tenants in common, and secret trusts are communicated to some but not all of the tenants in common, those to whom the communication was made are bound, the others taking beneficially. "To hold otherwise would enable one beneficiary to deprive the rest of their benefits by setting up a secret trust."[52]

But where a gift is made to them as joint tenants, a distinction is made between the case where the trust is communicated before the making of the will, and that where the communication is between the will and the death.[53] In the former case, all joint tenants are bound.[54] In the latter, only those who have accepted the trust are

[47] *Re Gardner* [1920] 2 Ch. 523.
[48] *Post*, p. 164.
[49] But a trust of land must be evidenced in writing; L.P.A. 1925, s. 53 (1) (*b*).
[50] *Per* Lord Wright in *Re Keen* [1937] Ch. 236 at p. 242; Nathan & Marshall, No. 72; *Re Boyes* (1884) 26 Ch.D. 531 at p. 536.
[51] [1939] Ch. 580 and 811.
[52] *Re Stead* [1900] 1 Ch. 237 at p. 241.
[53] See Maitland, p. 62.
[54] *Russell* v. *Jackson* (1852) 10 Hare 204; *Jones* v. *Badley* (1868) L.R. 3 Ch.App. 362; *Re Gardom* [1914] 1 Ch. 662; *Re Spence* [1949] W.N. 237; *Re Young* [1951] Ch. 344.

bound by it [55]; "the reason being that the gift is not tainted with any fraud in procuring the execution of the will." [56] But it is difficult to disagree with Farwell J., who confessed that he was "unable to see any difference between a gift made on the faith of an antecedent promise and a gift left unrevoked on the faith of a subsequent promise." [56]

5. Half-Secret Trusts

The question of enforcement of secret trusts takes on a completely different appearance if the will expressly gives the property to legatees *on trust*—without however stating what the trusts are. On the one hand, there is no possibility of fraud by the legatee; he cannot in any circumstances claim the property for himself; we saw what importance Lords Hatherley and Westbury attached to the factor of fraud.[57] On the other hand, it would be paradoxical that a gift by will "to X absolutely" could give rise to a trust for Y (if communicated before the death); but a gift "to X upon such trusts as I have communicated to him" made it impossible for Y to claim. The mention of the trust destroys the possibility of personal gain by X; it should not destroy the possibility of his holding on trust for Y. It was however at one time held that the mention of the existence of a trust did prevent the operation of the doctrine of secret trusts.[58] The validity of half-secret trusts was not finally established until the House of Lords decision in *Blackwell* v. *Blackwell* [59] in 1929.

In *Blackwell* v. *Blackwell*,[59] the testator by a codicil gave a legacy of £12,000 to legatees upon trust to apply the income "for the purposes indicated by me to them." The trust had been accepted prior to the execution of the codicil. The House of Lords enforced the trust. They were assisted by *Re Fleetwood* [60] and *Re Huxtable* [61] where it was held that the secret trust doctrine applied although the gift was in terms a gift upon trust, and where therefore there was no question of fraud in the legatee. Lord Sumner concluded that "it is communication of the purpose to the legatee, coupled with acquiescence or promise on his part, that removes the matter from the provision of the

55 *Burney* v. *MacDonald* (1845) 15 Sim. 6; *Moss* v. *Cooper* (1861) 1 J. & H. 352.
56 *Per* Farwell J. in *Re Stead* [1900] 1 Ch. 237 at p. 241.
57 *Ante*, p. 162.
58 *Moss* v. *Cooper* (1861) 1 J. & H. 352 at p. 367; Nathan & Marshall, No. 69; *Le Page* v. *Gardom* (1915) 84 L.J.Ch. 749 at p. 752; (1937) 53 L.Q.R. 501 (W. S. Holdsworth).
59 [1929] A.C. 318.
60 (1880) 15 Ch.D. 594.
61 [1902] 2 Ch. 793.

Wills Act and brings it within the law of trusts, as applied in this instance to trustees, who happen also to be legatees." [62] The effect of the bequest "remains to be decided by the law as laid down by the Courts before and since the [Wills] Act, and does not depend on the Act itself." [63] Thus the trust operated outside the Act and could be enforced without proof of fraud.

In *Blackwell* v. *Blackwell* [64] the trusts were communicated before the will and were stated to have been so communicated. Will the same rule apply where the trusts are or may be declared in the future? On the one hand, there is logically no difference between declarations of trusts before and after the will; for the will is ambulatory and of no effect until the death.[65] The distinction is not made, as we have seen, with fully secret trusts.[66] And, if the trust operates independently of the Wills Act, the date of the will should be immaterial. On the other hand, it is more difficult to *assume* acquiescence where the communication is after the will; in the absence of proof of express agreement, the fact of non-revocation may be the only basis on which to presume acquiescence. And, more important, "a testator cannot reserve to himself a power of making future unwitnessed dispositions by merely naming a trustee and leaving the purposes of the trust to be supplied afterwards. . . ." [67] To allow that to be done by semi-secret trust would be to give a wider rule for secret trusts than that which as we have seen is applied in the case of incorporation of documents by reference.[68] It would be surprising if the law of wills permitted this; but, if the proper explanation of the enforcement of secret trusts is that they operate outside the will and independently of the Wills Act, then the rules relating to incorporation by reference are, as has been pointed out, quite irrelevant.[69] And what Lord Sumner feared can always be achieved by a fully secret trust.

With half-secret trusts however the distinction appears to be made.

In *Re Keen* [70] the testator gave a sum of money to trustees "to be held upon trust and disposed of by them among such

[62] [1929] A.C. 318 at pp. 339–340.
[63] *Ibid.* at p. 339.
[64] [1929] A.C. 318.
[65] (1937) 53 L.Q.R. 501 (W. S. Holdsworth); Holdsworth, *Essays in Law and History*, p. 199.
[66] *Ante*, p. 163; *Re Gardner* [1920] 2 Ch. 523.
[67] *Per* Lord Sumner in *Blackwell* v. *Blackwell* [1929] A.C. 318 at p. 339.
[68] *In bonis Smart* [1902] P. 238; Tiley, p. 411.
[69] (1937) 53 L.Q.R. 501 (W. S. Holdsworth); *Moss* v. *Cooper* (1861) 1 J. & K. 352 at p. 367; Nathan & Marshall, No. 69.
[70] [1937] Ch. 236; Nathan & Marshall, No. 72; *Johnson* v. *Ball* (1851) 5 De G. & Sm. 85.

person, persons or charities as may be notified by me to them or either of them during my lifetime . . ." Otherwise the money was to fall into residue. Previously, one of the trustees had been given a sealed envelope containing the name of the beneficiary of the intended trust. In deciding in favour of the residuary legatees, the Court of Appeal held that the handing over of the sealed envelope was a communication of the trust, but that this, being *prior* to the date of the will,[71] was inconsistent with the terms of the will which provided for "a future definition . . . of the trust subsequent to the date of the will," while "the sealed letter relied on as notifying the trust was communicated . . . before the date of the will."[72]

Even if the will had been construed to include past as well as future communications, the trust would still have failed. A power to declare trusts in the future "would involve a power to change a testamentary disposition by an unexecuted codicil and would violate section 9 of the Wills Act."[73]

The criticisms of this rule have been discussed. The contrary rule exists in Ireland[74] and in most of the American jurisdictions.[75] The matter is still open to the House of Lords; it may be that the true ratio of *Re Keen*[76] is the narrow point of inconsistency. The present position is unsatisfactory; there is no sense in a rule which (in the case of communication between the will and the death) enforces a trust in a bequest "to X" but disregards the trust in a bequest "to X upon trust."

6. Surplus after Performing the Trust

We have seen that it is a question of construction of the language to determine whether the testator's intention was to make the legatee a trustee of the whole of the property given, or to make a beneficial gift to him subject to his performing certain obligations.[77] In the former case, any surplus left after carrying out the trusts is held upon resulting trusts[78]; in the latter, the legatee may keep it.[79]

[71] *Re Huxtable* [1902] 2 Ch. 793.
[72] *Re Keen*, *supra*, at p. 248.
[73] *Re Keen*, *supra*, at p. 247; *Johnson* v. *Ball* (1851) 5 De G. & Sm. 85; Nathan & Marshall, No. 73; *Re Hetley* [1902] 2 Ch. 866.
[74] *Riordan* v. *Banon* (1876) 10 Ir.R.Eq. 469; *contra Balfe* v. *Halfpenny* [1904] 1 Ir.R. 486; *Re Browne* [1944] Ir.R. 90; (1951) 67 L.Q.R. 413 (L. A. Sheridan).
[75] Scott, *Law of Trusts*, § 55.8; *Restatement of Trusts*, § 55, comment (*c*), (*h*).
[76] [1937] Ch. 236.
[77] *Ante*, p. 89.
[78] *Ante*, pp. 89–90.
[79] *Ante*, p. 89; *Irvine* v. *Sullivan* (1869) L.R. 8 Eq. 673.

If the will expressly names the legatee as a trustee, he may not bring parol evidence to establish that the intention was that he should keep the surplus; such evidence would conflict with the language of the will.[80]

7. Theoretical Basis of Secret Trusts

A. Inter Vivos Trust Dehors the Will

We have seen that the early trust cases were explained on the ground of fraud[81]; the fear that the legatee would otherwise keep the property for himself. This theory is inapplicable to half-secret trusts, for the legatee, being named as a trustee, cannot claim. Some theoretical justification is needed for failing to apply the Wills Act; and this is most commonly found by saying that the trusts that are being enforced are not trusts created by the will, but trusts arising outside and independently of (or dehors) the will[82]; that they arise by reason of the personal obligation accepted by the legatee.[83]

> In *Re Young*,[84] the testator made a bequest to his wife with a direction that on her death she should leave the property for the purpose which he had communicated to her. One of the purposes was that she would leave a legacy of £2,000 to the chauffeur. The chauffeur had witnessed the will and the question was whether he had thereby forfeited his interest.[85] Danckwerts J. held that he had not because the trust in his favour was not a trust contained in the will but one created separately and imposed upon the legatee.[86]

It is one thing to say that the trust operates outside the will, but it is another to say just how and when the trust takes effect. If some of the propositions discussed in Chapter 7[87] are sound, the

[80] *Re Rees' W.T.* [1950] Ch. 204; *Re Pugh's W.T.* [1967] 1 W.L.R. 1262; *Re Tyler* [1967] 1 W.L.R. 1269.

[81] *Ante*, p. 162.

[82] *Per* Lord Westbury in *Cullen* v. *Att.-Gen. for Northern Ireland* (1866) L.R. 1 H.L. 190 at p. 198; *per* Lord Sumner in *Blackwell* v. *Blackwell* [1929] A.C. 318 at p. 340.

[83] "I think the solution is to be found by bearing in mind that what is enforced is not a trust imposed by the will, but one arising from the acceptance by the legatee of a trust, communicated to him by the testator, on the faith of which acceptance the will was made or left unrevoked, as the case might be": *per* Lord Warrington of Clyffe in *Blackwell* v. *Blackwell* [1929] A.C. 318 at p. 342.

[84] [1951] Ch. 344; Tiley, p. 264; *Cullen* v. *Att.-Gen. for Northern Ireland* (1866) L.R. 1 H.L. 190.

[85] Wills Act 1837, s. 15. *Cf. Re Fleetwood* (1880) 15 Ch.D. 594; *O'Brien* v. *Condon* [1905] Ir.R. 51

[86] To the contrary is *Re Maddock* [1902] 2 Ch. 220, where the property subject to a fully secret trust was treated as being subject to a specific bequest for the purpose of the payment of debts out of the estate.

[87] *Ante*, pp. 150–151.

most natural way for this to occur is to treat the communication to the trustee as the declaration of trust, and the vesting of the property in the trustee by the will as the constitution of the trust. If this is so, the declaration is *inter vivos*, the Wills Act has no effect upon it, and the only statutory formalities that are relevant are Law of Property Act 1925,[88] s. 53 (1) (*b*), which requires that declarations of trusts of land should be evidenced in writing; but this would not affect the rule requiring a fraudulent trustee in a fully secret trust of land to hold on a constructive trust.[89] There would be no awkward distinction between declarations prior to and subsequent to the will in semi-secret trusts[90]; the sole question would be whether or not a trust was declared of the property before the death, and whether that trust became properly constituted by the vesting of the property in the trustee.

We have seen that the usual rule in the case of property coming to a person who had previously declared himself trustee of it was that the trust did not become constituted without a further manifestation of intention.[91] It was submitted that where a third person accepted an instruction to hold the property on certain trusts and the settlor subsequently transferred the property to him without further declaration, the trust would be constituted. It should make no difference whether the property passed to the trustee by conveyance *inter vivos* or by a will.[92] It will probably fail however if the trustee predeceases the testator.[93]

Until the property has so vested, the declaration can have no effect. It can be revoked or altered, and no doubt, if the settlor (or testator) acts as if he had forgotten the declaration or assumed it to be no longer existent, it will be treated as having expired. And no rational theory, it is suggested, can be found which will justify the remarkable decision in *Re Gardner No. 2*.[94]

> A wife left her estate to her husband absolutely; but secret trusts were imposed, and the husband was held to take the property subject to them. He died five days later. The trusts were that the property was to be divided at his death between five named beneficiaries one of whom had died before the wife;

88 *Ante*, p. 119.
89 L.P.A. 1925, s. 53 (2).
90 *Re Keen* [1937] Ch. 236; Nathan & Marshall, No. 72; *ante*, p. 165.
91 *Ante*, p. 151; *Brennan* v. *Morphett* (1908) 6 C.L.R. 22; *Matter of Gurlitz*, 105 Misc. 30, 172 N.Y.Supp. 523 (1918); *Re Northcliffe* [1925] Ch. 651.
92 As with the property received by Miss Towry Law from her sister and conveyed to the trustees: *Re Ellenborough* [1903] 1 Ch. 697; *Re Adlard* [1954] Ch. 29; *Re Ralli's W.T.* [1964] Ch. 288.
93 *Per* Cozens-Hardy L.J. in *Re Maddock* [1902] 2 Ch. 220 at p. 251.
94 [1923] 2 Ch. 230.

this share was successfully claimed by the representatives of the deceased beneficiary.[95]

A gift by will normally fails if the donee predeceases the testator,[96] and the estate of the donee can only claim if the donee acquired some interest in the property before he died. No such interest could exist in this case; and the theory which suggests that a secret trust can be treated as a declaration of trust *inter vivos* does not suggest than any interest is obtained by any beneficiary prior to the constitution of the trust by the vesting of the legal estate in the trustee.

B. Express or Constructive Trust

Closely connected with the theoretical basis of secret trusts is the question whether a secret trust is properly categorised as an express or constructive trust. The question is not merely academic, for, as we have seen,[97] constructive trusts of land are excepted from the requirement of written evidence. Is an oral secret trust of land valid?

An express trust is one declared by the settlor; a constructive trust is one imposed by the law.[98] Our analysis of secret trusts as being declarations dehors the will categorises them as express trusts. It is not sufficient to argue that they are constructive because "the court of equity finds the legatee . . . in possession of the legal title to property and imposes upon him an equitable obligation to hold that legal title on trust for a third party as a result of what has taken place outside the will."[99] That could be said of an express trust; and the only relevant factor "outside the will" is the declaration; that makes the trusts express. Half-secret trusts of land will not therefore be enforceable without written evidence.[1]

This analysis could be applied also to fully secret trusts. They however have, as it were, another string to their bow. They were enforced long before secret trusts were thought of as taking effect outside the will. We have seen that they have been said on high authority to be enforceable on the ground of fraud,[2] and they can claim also to be constructive trusts. It is submitted that fully secret trusts can be enforced under either head. The practical effect of

[95] [1920] 2 Ch. 523.
[96] Halsbury, Vol. 39, para. 1417 *et seq.*; *Jarman on Wills* (8th ed.), p. 438: a special exception is made in the case of children of the testator who predecease him, leaving issue: Wills Act 1837, s. 33. *Post*, p. 456.
[97] *Ante*, p. 119.
[98] *Post*, p. 218.
[99] Nathan & Marshall, p. 286.
[1] *Re Baillie* (1886) 2 T.L.R. 660 at p. 661.
[2] *McCormick* v. *Grogan* (1869) L.R. 4 H.L. 82; *ante*, p. 162.

this is that a fully secret trust of land is independent of any requirement of written evidence.[3]

C. Conclusion

Ultimately, the enforcement of secret trusts is a matter of policy relating to testamentary dispositions. The strict rules of the Wills Act 1837 are intended to achieve a reasonable degree of certainty in respect of the validity of testamentary dispositions. The stricter the rules, however, the more likely that injustice will be done if a mistake is made. Secret trusts have, in effect, created a wide gap in the law relating to testamentary dispositions. We have seen that the machinery is available to widen it still further.[4] The extent to which it should be so used is a matter of policy. It is possible to take the view that secret trusts should not be enforced beyond preventing the unjust enrichment of the fraudulent legatee; or to hold that the testator's intention should be upheld in every case. This is really a matter for the legislature, and it is submitted that it would be more satisfactory to review the whole matter and to incorporate into the statutory scheme as much of the secret trust doctrine as it is desired to retain.

[3] *Stickland* v. *Aldridge* (1804) 9 Ves.Jr. 516.
[4] *Re Keen* [1937] Ch. 236; Nathan & Marshall, No. 72; *Re Young* [1951] Ch. 344; Tiley, p. 264. *Ante*, p. 168.

CHAPTER 9

PROTECTIVE TRUSTS

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1. THE GENERAL PROBLEM

A DEBTOR'S property is in principle available for the satisfaction of his creditors and will, if he becomes bankrupt, pass to his trustee in bankruptcy; but it is possible, by making use of a protective trust, to obtain a measure of protection against such a calamity.

In the development of protective trusts the courts have been torn between two conflicting pressures. On the one hand, no man should have the power of defeating his creditors by putting his property beyond their grasp; on the other, it is most desirable that some means should be found for protecting a man's dependants from the ill effects of his extravagance. The technique of protective trusts involves the giving of a life interest subject to an executory gift over upon the happening of certain eventualities. Originally, the gift over was usually in favour of other members of the family [1]; but the modern practice is to provide for a gift over to trustees to hold on discretionary trusts in favour of a class which includes the life tenant and members of his family [1]; and this pattern is now provided for by the Trustee Act 1925, s. 33.[2] In most American jurisdictions, it is possible to impose a restraint on alienation in respect of an equitable life interest, and to enable the life tenant to retain the income in defiance of his creditors; this is known as a "spendthrift trust." [3] This has never been allowed in England.[4]

[1] *e.g.*, *Brooke* v. *Pearson* (1859) 27 Beav. 181; *Re Detmold* (1889) 40 Ch.D. 585.
[2] *Post*, p. 174.
[3] Scott, *Law of Trusts*, § 152; Griswold, *Spendthrift Trusts*.
[4] But from the early 19th century until 1935 it was possible to create a trust for the separate use of a married woman and to impose a restraint upon the anticipation or alienation. See Law Reform (Married Women and Tortfeasors) Act 1935 and Married Women (Restraint upon Anticipation) Act 1949.

2. Determinable and Conditional Interests

A distinction is made in law between an interest subject to a condition subsequent and a determinable interest.[5] The former exists where there is a gift of an absolute interest which is then cut down by the application of a condition; such as a gift to X absolutely, but if he should change his nationality, then over to Y. A determinable interest exists where something less than an absolute interest is given in the first place; as a gift to X until he changes (or so long as he retains) his nationality. The distinction is subtle,[6] it depends entirely upon the words of the gift; but it is a distinction that has importance in several contexts. The relevance in the present context is twofold: first, that a condition against alienation is void[7]; second, that a condition subsequent, being one which effects a forfeiture of an existing interest, is strictly construed[8]; if the condition is held void, the interest becomes absolute.[9] The determining event, however, in the case of a determinable interest is less strictly construed; and if it should be held invalid, the whole interest fails.[10]

Thus it is clear that a *condition* so drafted as to terminate an interest upon alienation[11] or bankruptcy[12] is void and the prior interest is absolute. But an interest *determinable* on alienation or bankruptcy is valid.[13] Further, courts place an even more generous construction upon the validity of determining events in the case of life interests.[14] The basis of protective trusts is therefore a determinable life interest.

5 *Ante*, p. 238; *Brandon* v. *Robinson* (1811) 18 Ves.Jr. 429 at p. 433 (Lord Eldon); Nathan & Marshall, No. 38; *Rochford* v. *Hackman* (1852) 9 Hare 475; Nathan & Marshall, No. 37; M. & W., p. 75 *et seq.*; Cheshire, p. 111 *et seq.* The clue to the existence of a determinable limitation is the use of words such as "until," "so long as," "whilst" as distinct from phraseology such as "but if" and "when, if ever."

6 "Little short of disgraceful to our jurisprudence," *per* Porter M.R. in *Re King's Trusts* (1892) 29 L.R.Ir. 401 at p. 410, quoted M. & W., p. 78.

7 Co.Litt. 223a; *Re Brown* [1954] Ch. 39.

8 *Clavering* v. *Ellison* (1859) 7 H.L.Cas. 707; *Sifton* v. *Sifton* [1938] A.C. 656.

9 Co.Litt. 206a, b; *Re Greenwood* [1903] 1 Ch. 749.

10 *Re Moore* (1888) 39 Ch.D. 116. (Gift of a weekly sum to T's sister "whilst . . . living apart from her husband" construed as a gift determinable upon returning to her husband.)

11 *Brandon* v. *Robinson* (1811) 18 Ves.Jr. 429; Nathan & Marshall, No. 38; *Graves* v. *Dolphin* (1826) 1 Sim. 66; *Rochford* v. *Hackman* (1852) 9 Hare 475; Nathan & Marshall, No. 37; *Re Dugdale* (1888) 38 Ch.D. 176; *Re Brown* [1954] Ch. 39; (1943) 59 L.Q.R. 343 (Glanville Williams).

12 *Younghusband* v. *Gisborne* (1846) 15 L.J.Ch. 355; *Re Sanderson's Trust* (1857) 3 K. & J. 497.

13 *Post*, p. 173; see also the earlier authorities relied on by Turner V.-C. in *Rochford* v. *Hackman*, *supra*.

14 Jarman, p. 1486.

3. Self-Protection

A settlor cannot make a settlement which will protect himself against his own bankruptcy.[15]

> In *Re Burroughs-Fowler*,[16] the settlor, by ante-nuptial settlement, settled property upon trust to pay the income to himself for life or until one of certain events should occur, including his bankruptcy, after which event the income was to be paid to his wife. The settlor was adjudicated bankrupt during the wife's lifetime. It was held that the life interest vested indefeasibly in his trustee in bankruptcy, who could validly dispose of it.

A settlor may however protect himself against other forms of alienation, voluntary or involuntary. And if the limitation, as is usual, provides for the termination of his interest upon any one of such events *or* upon his bankruptcy, the gift over, as we have seen, is void in the event of bankruptcy, but valid in all other cases.[17] If the gift over has taken effect upon, for example, an attempt to charge the life interest, the subsequent bankruptcy of the settlor is ineffective.

> In *Re Detmold*,[18] a marriage settlement of the settlor's own property provided for the payment of the income to the settlor for life or "till he shall become bankrupt or shall . . . suffer something whereby the same . . . would . . . by operation of law . . . become . . . payable to some other person . . ." and, after such determination, on trust to pay the income to his wife. In July 1888, an order was made appointing a judgment creditor to be receiver of the income; and in September 1888 the settlor was adjudicated bankrupt. It was held that the forfeiture took place upon the involuntary alienation of the income by process of law; the wife then became entitled and the subsequent bankruptcy of the settlor had no effect upon it.

4. Protected Life Interests in Persons Other than the Settlor

Though a man cannot make a settlement of his own property upon himself until bankruptcy, and then over, yet a trust created by A to pay the income to B until B dies or becomes bankrupt or alienates or charges his life interest and then over to C is good in the event of

[15] *Wilson* v. *Greenwood* (1818) 1 Swan. 471 at p. 481, note (*a*); *Mackintosh* v. *Pogose* [1895] 1 Ch. 505; *Re Wombwell* (1921) 125 L.T. 437.
[16] [1916] 2 Ch. 251; this rule is preserved by T.A. 1925, s. 33 (3).
[17] *Re Detmold* (1889) 40 Ch.D. 585; *Re Brewer's Settlement* [1896] 2 Ch. 503; *Re Johnson* [1904] 1 K.B. 134.
[18] (1889) 40 Ch.D. 585; *Brooke* v. *Pearson* (1859) 27 Beav. 181; *Knight* v. *Browne* (1861) 30 L.J.Ch. 649; *Re Brewer's Settlement* [1896] 2 Ch. 503.

B's bankruptcy.[19] The essence of the device of protected life interests [20] is that, on the occurrence of a determining event, such as alienation or bankruptcy, the interest of the life tenant determines, and the trustees then hold the property on discretionary trusts for the benefit of the life tenant and his family.

Some early attempts to reach this result failed, owing to the absence of any clear gift over of the income.[21] Eventually, however, discretionary trusts became accepted,[22] and at the present day quite independently of protective trusts, and largely because of their fiscal advantages, they form the basis of a large percentage of modern family settlements.[23]

5. Trustee Act 1925, s. 33

Before 1926 it was necessary to set out expressly the terms of the trusts; and a settlor may still do so if he wishes.[24] In relation, however, to trusts coming into operation after 1925, the Trustee Act 1925, s. 33, "provides a shorthand arrangement whereby a settlor may establish a trust without setting forth in detail all the terms upon which the property is to be held." [25] The exact words of section 33 need not be used so long as the intention is clear.[26] The section then applies subject to any modification contained in the instrument creating the trust.[27]

Section 33 (1) provides:

> "Where any income, including an annuity or other periodical income payment, is directed to be held on protective trusts for the benefit of any person (in this section called 'the principal beneficiary') for the period of his life or for any less period, then, during that period (in this section called the 'trust period') the said income shall, without prejudice to any prior interest, be held on the following trusts, namely:—
>
> (i) Upon trust for the principal beneficiary during the trust period or until he . . . does or attempts to do or suffers

19 *Billson* v. *Crofts* (1873) L.R. 15 Eq. 314; *Re Aylwin's Trusts* (1873) L.R. 16 Eq. 585; *Re Ashby* [1892] 1 Q.B. 872.

20 (1957) 21 Conv.(N.S.) 110 (L. A. Sheridan).

21 *Snowdon* v. *Dales* (1834) 6 Sim. 524; the point is discussed in *Rochford* v. *Hackman* (1852) 9 Hare 475.

22 And may take effect where the forfeiture precedes the settlement; as where the bankruptcy began before the testator died: *Metcalfe* v. *Metcalfe* [1891] 3 Ch. 1. See also *Re Forder* [1927] 2 Ch. 291; *Re Walker* [1939] Ch. 974.

23 *Post*, p. 181.

24 *Re Shaw's Settlement* [1951] Ch. 833; *Re Rees* (*decd.*) [1954] Ch. 202; *Re Munro's S.T.* [1963] 1 All E.R. 209.

25 Griswold, *Spendthrift Trusts*, p. 375.

26 *Re Wittke* [1944] Ch. 166 ("upon protective trusts for the benefit of my sister"); *Re Platt* (1949) unreported; C.L.C. 10917 ("for a protective life interest").

27 T.A. 1925, s. 33 (2).

any act or thing, or until any event happens, other than an advance under any statutory or express power, whereby, if the said income were payable during the trust period to the principal beneficiary absolutely during that period, he would be deprived of the right to receive the same or any part thereof, in any of which cases . . . this trust of the said income shall fail or determine;

(ii) [and during the remainder of the trust period] . . . upon trust for the application thereof for the maintenance or support, or otherwise for the benefit, of all or any one or more exclusively of the other or others of the following persons (that is to say)—

(*a*) the principal beneficiary and his or her wife or husband, if any, and his or her children or more remote issue, if any; or

(*b*) if there is no wife or husband or issue of the principal beneficiary in existence, the principal beneficiary and the persons who would, if he were actually dead, be entitled to the trust property or the income thereof or to the annuity fund, if any, or arrears of the annuity, as the case may be;

as the trustees in their absolute discretion, without being liable to account for the exercise of such discretion, think fit."

6. Events Determining the Life Tenant's Interest

It is necessary in each case to decide whether or not the event which has occurred is sufficient to determine the interest of the life tenant, and thus to bring the discretionary trusts into operation.[28] The question usually arises under trusts governed by the Trustee Act 1925, s. 33. Where the question arises in respect of an express protective trust, the question will be dependent upon the construction of the particular trust under consideration.[29] The principles applicable will however be the same.

If the principal beneficiary alienates his interest or goes bankrupt, a forfeiture obviously occurs. The question in other circumstances has been much litigated; a clear dividing line between those circumstances which will and those which will not effect a forfeiture is hard to draw; the matter is best explained by illustrations.

[28] *Re Brewer's Settlement* [1896] 2 Ch. 503.
[29] *Ibid.* at p. 507; *Re Dennis' S.T.* [1942] Ch. 283 at p. 286.

A. General

In *Re Balfour's Settlement*,[30] income was payable to the life tenant until he should "do . . . something whereby the same or some part thereof would . . . if belonging absolutely to him become . . . payable to some other persons." The trustees had, at the life tenant's request, and in breach of trust, advanced parts of the capital to him. They then asserted their right to retain the income of the fund in order to make good the breach. Subsequently the life tenant went bankrupt. Farwell J. held that the life tenant's interest had determined because the trustees became entitled to the income.[31] The life interest was thus saved from the bankruptcy.

In *Re Baring's Settlement Trusts* [32] a sequestration order was made against the property of a mother who failed to obey a court order to return her children to the jurisdiction. On her return the question arose whether her protected life interest under a family trust was forfeited. Morton J. held that it was, even though the sequestration order against her property was only temporary. She was a member of the discretionary class and the trustees could pay the income to her if they so wished.

In *Re Dennis' Settlement Trusts* [33] a family trust gave a protected life interest to the settlor's son, an infant; on his attaining twenty-one, a rearrangement took place which provided that for the next six years the trustees should pay to him only part of the income and should accumulate the rest for him. The rearrangement caused a forfeiture.

On the other hand, there was held to be no forfeiture where a life tenant under a protective trust (terminable if the income became "payable to . . . some other person") assigned his interest to the trustees of his marriage settlement (of which he was tenant for life), authorised the trustees to charge their expenses to the fund and appointed them his attorneys to receive the income.[34] Again there was no forfeiture where the life tenant was of unsound mind and a receiver was appointed.[35] Nor does the fact that a receiver's fees become payable out of the estate of such a person effect a forfeiture.[36]

[30] [1938] Ch. 928.
[31] Distinguishing *Re Brewer's Settlement* [1896] 2 Ch. 503, where the bankruptcy took place before the trustees exercised their right.
[32] [1940] Ch. 737.
[33] [1942] Ch. 283.
[34] *Re Tancred's Settlement* [1903] 1 Ch. 715.
[35] *Re Oppenheimer's W.T.* [1950] Ch. 633; *Re Marshall* [1920] 1 Ch. 284.
[36] *Re Westby's Settlement* [1950] Ch. 296, overruling *Re Custance's Settlement* [1946] Ch. 42.

And an authority to pay to creditors the dividends due from a company for a period of time during which the company declared no dividend did not cause a forfeiture.[37]

B. Order of the Court under Trustee Act 1925, s. 57 [38]

The court may make an order under Trustee Act 1925, s. 57, which varies existing trusts. If an order is made authorising the trustees to raise money to pay the debts of a life tenant under a protective trust, there is no forfeiture; for the power must be treated as if it had been "inserted in the trust instrument as an over-riding power."[39] And if the order provides that the life tenant effects an insurance policy to secure a like amount of money at his death, and that the trustees shall pay the premiums out of the income if the life tenant fails to do so, there is no forfeiture so long as the life tenant makes the payments; but if the life tenant fails to pay and they become payable by the trustees from the income, there would be a forfeiture.[40]

C. Order by Divorce Court under Matrimonial Causes Acts 1859–1965

It is not clear whether a forfeiture is effected when an order is made in the Probate, Divorce and Admiralty Division of the High Court which alters a protected life interest under a marriage settlement.[41] In *Re Richardson's Will Trusts*,[42] the court ordered that the principal beneficiary should charge his interest with an annual payment of £50 in favour of his divorced wife. The charge was held to create a forfeiture. On the other hand, in *General Accident Fire and Life Assurance Corporation Ltd.* v. *I.R.C.*[43] an order of the Divorce Court diverting part of the income from the life tenant in favour of a former wife was held not to effect a forfeiture.

These cases are distinguishable on a narrow ground of construction of section 33.[44] But the broader ground of the decision, that this situation has no relevance to the real purpose of protective trusts, would seem to apply to the charge in *Re Richardson's Will Trusts* [45]

[37] *Re Longman* [1955] 1 W.L.R. 197.
[38] *Post*, p. 383.
[39] *Re Mair* [1935] Ch. 562 at p. 565, *per* Farwell J.
[40] *Re Salting* [1932] 2 Ch. 57 at p. 65.
[41] Which the court has power to do under Matrimonial Causes Act 1965, s. 17.
[42] [1958] Ch. 504; *Re Allsopp's Marriage Settlement* [1959] Ch. 81; *Re Richardson* illustrates the advantage of establishing a series of protective trusts, so that a charge upon the principal beneficiary's interest in one of the trusts does not effect a forfeiture of his interest in the whole: (1958) 74 L.Q.R. 182 (R.E.M.).
[43] [1963] 1 W.L.R. 1207.
[44] *Ibid.*, see Donovan L.J. at p. 1217 and Russell L.J. at p. 1221; (1963) 27 Conv. (N.S.) 517 (F. R. Crane).
[45] [1958] Ch. 504.

as much as to the diversion of part of the income in the *General Accident* case.[43] It is submitted that the principle of the *General Accident* case [43] is sound. As Donovan L.J. said [46]: "... the section is intended as a protection to spendthrift or improvident or weak life tenants. But it can give ... no protection against the effect of a court order such as was made here. Furthermore, if such an order involves a forfeiture much injustice could be done." Perhaps the problem can be rationalised with the cases on section 57 by saying with Russell L.J., who made clear, however, that he did not rest his decision on this approach: "the settlement throughout was potentially subject in all its trusts to such an order as was made." [47] *Re Richardson's Will Trusts* [48] was not mentioned; but an earlier case on the Matrimonial Causes Act 1859 in favour of forfeiture, *Re Carew*,[49] was overruled. It is tempting to say that *Re Richardson's Will Trusts* [48] is wrong; but it should be noted that in that case, as in *Re Carew*,[49] the decision in favour of forfeiture forwarded the broad policy of section 33; for the forfeiture in those cases allowed the discretionary trusts to operate when otherwise the trustee in bankruptcy would have claimed the interest.

D. Other Situations

It has been held that a forfeiture occurred where a life tenant became disentitled to receive income under a protective trust because she lived abroad in enemy occupied territory [50]; the income thus became applicable under the discretionary trusts. The Custodian of Enemy Property had no claim, nor could the trustees treat the tenant for life as still entitled and retain the income until the end of the war.[51]

7. Advancements

Section 33 (1) expressly exempts, as a cause of forfeiture, an advancement under any statutory or express power. This means that if a life tenant makes an advancement under an express power of advancement, or consents to one under the provisions of section 32,[52] the fact that he no longer receives the income of the part of the capital which has been advanced does not effect a forfeiture.[53] It

[46] [1963] 1 W.L.R. 1207, *per* Donovan L.J. at p. 1218.
[47] *Ibid.* at p. 1222.
[48] [1958] Ch. 504.
[49] (1910) 103 L.T. 658.
[50] Trading with the Enemy (Custodian) Order 1939 (S.R. & O. 1939 No. 1198). See also S.R. & O. 1946 No. 2141, para. 1, proviso.
[51] *Re Gourju's W.T.* [1943] Ch. 24; *Re Allen-Meyrick's W.T.* [1966] 1 W.L.R. 499.
[52] The section which gives a statutory power of advancement to trustees.
[53] See however *General Accident, etc.* v. *I.R.C.* [1963] 1 W.L.R. 1207 which suggests that an advancement does not effect a forfeiture and that the proviso to s. 33 is *ex abundanti cautela*.

appears that the same rule applies in the case of an express protective trust [54]; *Re Stimpson* [55] is to the contrary, but is regarded as of doubtful authority.

8. Effect of Forfeiture

When a forfeiture has taken place, the trusts in section 33 (1) (ii), or those expressly contained in the instrument, as the case may be, come into play. Under section 33, as we have seen,[56] there are discretionary trusts in favour of the principal beneficiary and other persons, depending on whether or not a spouse or issue of the principal beneficiary is in existence. The trustees may apply the income for the remainder of the trust period for any member of the discretionary class. The principal beneficiary is not entitled to any income; but the trustees may, if they wish, pay it to him. They must pay the income to one or more of the members.[57] If the trustees decide to pay some income to the principal beneficiary or for his benefit, they face the problem that the money may be claimed by the trustee in bankruptcy as the assignee of his "interest" under the discretionary trust [58]; or the trustees themselves may be held liable.[59] But "if the trustees were to pay an hotel-keeper to give him a dinner he would get nothing but the right to eat a dinner, and that is not property which could pass by assignment or bankruptcy." [60] It is safer to pay the money to third persons in satisfaction of services provided for the bankrupt.

[54] *Re Hodgson* [1913] 1 Ch. 34; *Re Shaw's Settlement* [1951] Ch. 833; *Re Rees (decd.)* [1954] Ch. 202.
[55] [1931] 2 Ch. 77.
[56] *Ante*, p. 175.
[57] *Re Gourju's W.T.* [1943] Ch. 24.
[58] *Re Coleman* (1888) 39 Ch.D. 443; or perhaps only the surplus above that needed for his maintenance; *Re Ashby* [1892] 1 Q.B. 872 at p. 877.
[59] *Re Bullock* (1891) 64 L.T. 736 at p. 738.
[60] *Re Coleman* (1888) 39 Ch.D. 443 at p. 451.

CHAPTER 10

DISCRETIONARY TRUSTS

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1. NATURE OF A DISCRETIONARY TRUST [1]

A DISCRETIONARY trust is one in which the trustees hold property on trust for a group of beneficiaries and are required by the terms of the trust to pay or apply the income or capital in favour of such of the beneficiaries as the trustees shall in their discretion think fit.[2] In such a situation, no individual beneficiary is entitled to any part of the property, income or capital; he receives whatever the trustees see fit to give him and no more.[3]

In practice, the settlor will often be able to influence the trustees in the way in which they exercise their discretion, either by personal consultation with them or by giving them a written statement of the ways in which he hopes that they will exercise their discretion. All such influence must however be extra-legal. Written instructions will usually say expressly that they impose no legal obligation or restriction on the trustees. If the discretion of the trustees were effectively limited, the result would be that the beneficiaries would to that extent obtain fixed beneficial interests; and the advantages, discussed below, of discretionary trusts would be lost.

A discretionary trust must be distinguished from a mere power.[4]

[1] See (1951) 21 Conv.(N.S.) 55 (L. A. Sheridan).
[2] For the powers of the court to control the exercise by trustees of a discretion, see *post*, p. 308.
[3] *Re Munro's S.T.* [1963] 1 W.L.R. 145 at p. 148; Snell, p. 149.
[4] *Ante*, p. 95; the article in 21 Conv.(N.S.) 55, *supra*, does not always make clear that a discretionary trust is a trust and not a power.

In the case of a trust, the trustees are under a duty to carry out the trust, *i.e.*, to exercise their discretion.[5] With a power, they may do so or not as they wish.[6] From the point of view of a possible recipient under an exercise of the discretion it may not look as if there is much difference between a power and a trust. In each case he has nothing of value until the trustees' discretion is exercised in his favour; he is entitled only to what the trustees elect to give him. But the distinction between powers and trusts is vital in various ways in this context as will be seen.

2. Advantages of Discretionary Trusts over Fixed Trusts

There are several reasons why a settlor may prefer to establish discretionary rather than fixed trusts; where, in other words, he prefers to give a beneficiary no ascertainable interest in the property, but rather a possibility that the trustees may in exercising their discretion benefit him.

A. To Protect the Interest of the Intended Beneficiary against Bankruptcy

If one member of a class of beneficiaries under a discretionary trust goes bankrupt, the trustee in bankruptcy is not entitled to claim any part of the fund.[7] The trustee in bankruptcy is however entitled to goods and money paid over by the trustees to the beneficiary in the exercise of their discretion[8]; or perhaps only to the amount in excess of that needed for the maintenance of the beneficiary.[9] The trustee in bankruptcy is however excluded if the trustees make the maintenance payments to third parties, such as a hotel keeper[10] or tradesman.[11]

We have already seen that discretionary trusts are employed under protective trusts as a means whereby a protected life tenant may continue to receive some benefit from settled funds after his bankruptcy.[12] Indeed, this was their earliest use.

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5 *Gartside* v. *I.R.C.* [1968] A.C. 553.

6 *Per* Lord Upjohn in *Re Gulbenkian's Settlements* [1968] 3 W.L.R. 1127 at p. 1138.

7 *Re Ashby* [1892] 1 Q.B. 872 at p. 877; *Re Bullock* (1891) 64 L.T. 736; *Holmes* v. *Penney* (1856) 3 K. & J. 90. If the bankrupt is the sole member of the discretionary class, the interest passes to the trustee in bankruptcy: *Green* v. *Spicer* (1830) 1 Russ. & M. 395.

8 *Re Coleman* (1888) 39 Ch.D. 443.

9 *Re Ashby, supra,* at p. 877 *per* Vaughan Williams J.; *Page* v. *Way* (1840) 3 Beav. 20, *per* Lord Langdale M.R.; *ante*, p. 179.

10 *Re Coleman, supra,* at p. 451.

11 *Godden* v. *Crowhurst* (1842) 10 Sim. 642 at p. 656.

12 *Ante*, pp. 173, 179.

B. To Continue to Exercise Control over Young or Improvident Beneficiaries

Many take the view that it is unwise to put large sums of money at the disposal of beneficiaries if they are young or extravagant. This is due not only to the fear of the loss of family capital in case of insolvency; but also because a rich young beneficiary may be encouraged to develop habits of idleness and extravagance, and waste the inheritance; older beneficiaries may already have done so. While the discretionary trust is in operation, each member of the class of beneficiaries is entitled only to the money which the trustees see fit to allocate to him in the exercise of their discretion. The settlor may, as explained above, be able to influence the trustees by personal intervention or by giving the trustees an indication of the way in which he wishes them to exercise their discretion, without imposing any legal restriction upon its free exercise.[13]

C. Saving of Estate Duty, Income Tax and Surtax

The most significant reason for the popularity of discretionary trusts in recent years has been that they have provided an opportunity to reduce liability to estate duty and to tax.[14] As inflation continues and fiscal burdens increase, such questions become all the more important in matters of family settlements and trusts. Consequently, discretionary trusts cannot be understood without considering these issues. Discretionary trusts are drafted so as to obtain the maximum benefit for the beneficiaries under the law currently in force; but fiscal legislation changes annually. In the present context, a knowledge of the pre-1969 law is necessary for an understanding of the form of discretionary trust which will be commonly found in practice. It is necessary also to appreciate the alterations which have been made in relation to discretionary trusts by the Finance Act 1969. The Act was passed while these pages were in proof, and it is not possible to do more than point out some of the major changes which are made by it. For an up-to-date assessment of the law, it will be necessary to consult the Act and the Finance Acts of subsequent years.

At the outset the distinction between tax evasion and tax avoidance should be made clear. Tax evasion is a term used to describe the failure to pay tax which is legally due to be paid; evasion is

[13] See *Re Druce's S.T.* [1962] 1 W.L.R. 363.
[14] See generally Potter & Monroe, Chap. 4; Morcom, Chap. 7; Dymond, p. 114 *et seq.*; Beattie, *Elements of Estate Duty* (6th ed.), p. 89 *et seq.*

both morally wrong and criminal. Tax avoidance is quite different. This means the arrangement of a person's affairs in such a way that his legal liability to tax is reduced. The question simply is: if there are several ways of dealing with your property, will you choose to deal with it in a way which attracts larger tax payments or smaller? Unless a property owner considers his duty to the Treasury greater than to his family (or to other possible beneficiaries, such as charities) the answer is obvious. Thus "the attention of conveyancers at the present time has been directed to the problem of preserving from the inroads of the tax collector such parts of a family's fortune (whether inherited or earned during the lifetime of the family's present head) as may lawfully be preserved, by a redistribution of property amongst the members of the family." [15]

In order to demonstrate some of the advantages which discretionary trusts have enjoyed from this point of view, it is necessary to explain some of the basic rules relating to estate duty.

3. Estate Duty [16]

Estate duty is payable under Finance Act 1894, s. 1, in respect of a person's death "upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death. . . ." The occasions on which property passes on death for the purposes of estate duty are listed in section 2,[17] which has been subjected to substantial amendment by the Finance Act 1969.[18] One of the occasions on which duty is payable is in respect of property disposed of *inter vivos* by the deceased within seven years of his death.[19]

Three other vital questions must be noted at this stage.

First: the value for estate duty purposes is that of the *property* which passes, and not that of the interest of the deceased or of the next taker. Thus if the deceased had only a limited interest such as a life interest, or if the deceased gives such a limited interest to a beneficiary,[20] the property which passes is not merely the limited

[15] Potter & Monroe, p. 71.

[16] See generally Dymond; Green, *Death Duties* (6th ed.); Hanson, *Death Duties* (10th ed.). For an excellent short account, see Beattie, *Elements of Estate Duty* (6th ed.).

[17] F.A. 1969, s. 36 (1). For the relationship between ss. 1 and 2 prior to F.A. 1969, see *Earl Cowley* v. *I.R.C.* [1899] A.C. 198; *Public Trustee* v. *I.R.C.* [1960] A.C. 398.

[18] See especially the "substituted" s. 2 (1) (*b*), (now contained in F.A. 1969, s. 36 (2), replacing the old s. 2 (1) (*b*)) and s. 2 (1) (*c*).

[19] F.A. 1894, s. 2 (1) (*c*); F.A. 1968, s. 35.

[20] *Christie* v. *Lord Advocate* [1936] A.C. 569.

interest, but the whole of the property. In short: on the death of a life tenant, duty is payable on the whole capital of the fund.[21]

Secondly: subject to exceptions,[22] all property passing on the death is aggregated so as to form one estate, and the duty payable is worked out on the basis of such aggregate figure.[23]

Thirdly: there are a number of exemptions from liability to estate duty.[24] The only relevant exemption for our present purposes is that of a limited interest in the second spouse to die.[25] Where property is settled, and estate duty has been paid on the death of the first spouse to die, no further duty is payable in respect of a life interest which terminates on the death of the other spouse; duty is payable on the second death if he or she was, at the date of his or her death, or had at any time during the continuance of the settlement been, competent to dispose of the property.[25] The normal situation for this exemption to operate is where a spouse dies and leaves a life interest in the estate to the other spouse; duty is payable on the death of the first, but not on that of the second. If any other person had been given a life interest, or if the surviving spouse were given an absolute interest, duty would be payable and the rules of aggregation applied.[26]

It will be seen from the scale of rates of estate duty now in force that the incidence of estate duty can drastically reduce the capital of a family.[27] For example, if a man dies with an estate worth £60,000 having a life interest in a marriage settlement of £60,000 and in a settlement made by his parents also of £60,000, duty payable on the death of such person would be £100,625, making the estate rate applicable to the property in these funds one of 55·9 per cent. If the value of the three component parts of the aggregation had been greater, the rate would of course be higher. And it may well be that the duty payable will be higher than the actual value of the deceased's

[21] *Earl Cowley* v. *I.R.C.* [1899] A.C. 198. F.A. 1969, s. 36 (2).

[22] Where, for example, the deceased's own ("unsettled") property does not exceed £10,000. An estate under that figure forms an estate by itself for estate duty purposes. F.A. 1954, s. 33 (1). See also F.A. 1894, s. 4, proviso; F.A. 1968, s. 35; F.A. 1969, Sched. 21, Part V.

[23] The rates of estate duty are given at Appendix "A" which shows both the rates applicable to deaths prior to and including April 15, 1969, and those which are made applicable to deaths after that date. It will be seen that the basis of calculation changes from a "slab" system to a "slice" system. There are reduced rates for agricultural property.

[24] Beattie, *Elements of Estate Duty* (6th ed.), Chap. 2.

[25] F.A. 1894, s. 5 (2); F. (1909–10) A. 1910, s. 55; F.A. 1914, s. 14; F.A. 1954, s. 32, as amended by F.A. 1956, s. 36. F.A. 1969, Sched. 17, Part II, para. 6.

[26] *Re Parsons* [1943] Ch. 12.

[27] The calculations in the example are based upon the scale of duty introduced by the Finance Act 1969. The resulting percentage of duty is known as estate rate, F.A. 1969, s. 35 (2).

interests. In the example given, if he became entitled to the life interests late in life, these interests, valued actuarially, would be less than £20,000 each; so that the two life interests, plus his own £60,000, would be worth less than the £100,625 that is chargeable upon his death.[28]

4. Settlor's Objectives

In order to prevent results such as this, a settlor will attempt to arrange his affairs so as to avoid or reduce estate duty as best he can. Clearly he must always avoid a series of life interests. The ideal is to avoid liability to duty on his own death, and on the death of any of the beneficiaries under any settlement he creates; to make this happy situation continue for as long as he can; and further, to reduce, during the continuance of the settlement, liability to income tax and surtax. This could all be done; but the estate duty advantages are largely excluded by the Finance Act 1969.

A. The Death of the Settlor

Liability to duty on the death of the settlor is a problem which is met in connection with all settlements, and is not peculiar to settlements on discretionary trusts. Settled property will be dutiable upon the settlor's death unless (a) the settlor survived at least seven years [29] from the date of the transfer of the property to the trustees,[30] and (b) bona fide possession and enjoyment of the property had been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor or of any benefit to him by contract or otherwise.[31]

The requirements for an effective gift were discussed in Chapter 7.[32] A word must be said here on the exclusion of the donor, and of the exclusion of any benefit to him by contract or otherwise. A donor has been held not to have been excluded where, fourteen years after settling property upon his daughter, he borrowed from her the income of the trust fund so that he could apply it towards his own

[28] In the case of settled property, duty is charged upon that property; and this is borne by the beneficiaries under the settlement: F.A. 1894, s. 9 (1).

[29] F.A. 1968, s. 35. Duty is chargeable at lower value if the settlor survives four or more years; the value of the property passing is reduced for duty purposes by 15, 30, 60 per cent. if the death occurs in the fifth, sixth or seventh year respectively: F.A. 1960, s. 64; F.A. 1968, s. 35 (2).

[30] *i.e.*, the relevant date is that of the transfer of the property and not that of the date of the settlement; and different dates will apply to separate transfers. *Re Rose* [1952] Ch. 499; *ante*, p. 137.

[31] F.A. 1894, s. 2 (1) (*c*); Customs and Inland Revenue Act 1881, s. 38 (2); Customs and Inland Revenue Act 1889, s. 11 (1); F.A. 1968, s. 35 (4).

[32] *Ante*, p. 131.

bank overdraft.[33] Further, apart from Finance Act 1959, s. 35 (2), the payment of full consideration for the benefit received will not prevent duty being payable.[34] Section 35 (2) however provides that actual occupation of land or actual enjoyment of an incorporeal right over land, or actual possession of chattels shall be disregarded if full consideration is given in money or money's worth. Thus a settlor may now give a house to the donee, and occupy it himself, paying a full economic rent to the donee. The provisions of the sub-section are however of limited application and must be strictly complied with.

A distinction must also be made " which is so fine as to be almost beyond perception," [35] between a situation, as in *Chick's* case,[36] where the settlor gave away the property and subsequently enjoyed a benefit himself, and one where he reserves a benefit and then gives away the rest. Thus a settlor may reserve an interest to himself and give the rest away; or he may give a limited interest and retain the ultimate reversion for himself. In such situations, duty on the settlor's death is payable upon the value of the interest he retains, but not upon the gifted property.[37] In *St. Aubyn* v. *Att.-Gen.*[38] Lord Radcliffe, after referring to *Munro* v. *Commissioner of Stamp Duties*,[37] *Commissioner of Stamp Duties* v. *Perpetual Trustee Co.*,[39] and *Re Cochrane*,[40] summed the matter up by saying [41]: " All these decisions proceed upon a common principle, namely, that it is the possession and enjoyment of the actual property given that has to be taken account of, and that if that property is, as it may be, a limited equitable interest . . . or an interest in property subject to an interest that is retained, it is of no consequence for this purpose that the retained interest remains in the beneficial enjoyment of the person who provides the gift."

If it is desired to make the settlor or the settlor's spouse a trustee, care should be taken to ensure that neither of them can obtain a benefit under the settlement by reason of any right or power arising from their being a trustee.[42] In particular, a clause permitting a trustee to be remunerated for his services as trustee has been held to be a

[33] *Commissioner of Stamp Duties (N.S.W.)* v. *Permanent Trustee Co. of N.S.W.* [1956] A.C. 512.
[34] *Chick* v. *Stamp Duties Commissioner* [1958] A.C. 435.
[35] Beattie, *Elements of Estate Duty* (6th ed.), p. 48.
[36] [1958] A.C. 435.
[37] *Munro* v. *Commissioner of Stamp Duties* [1934] A.C. 61.
[38] [1952] A.C. 15.
[39] [1943] A.C. 425.
[40] [1905] 2 Ir.R. 626; [1906] 2 Ir.R. 200.
[41] [1952] A.C. 15 at p. 49; *cf. Earl Grey* v. *Att.-Gen.* [1900] A.C. 124.
[42] Potter & Monroe, pp. 74–76; Morcom, pp. 155–156.

reservation of a benefit [43]; there is apparently no decision relating to the ordinary professional charging clause.[44] It is best to avoid any risk of attracting duty in this way and to include in the settlement a provision excluding the settlor and spouse from the charging clause provision, or one excluding each of them from any benefit under the settlement.

B. The Deaths of Beneficiaries

It was explained that estate duty is payable upon the value of property passing on a death and that section 2 [45] contains an exhaustive list of the occasions on which property passes for estate duty purposes. Where a settlor gives a life interest or an absolute interest to beneficiaries, duty will be payable on the death of each beneficiary upon the capital value of his share of the settled funds. The device of a discretionary trust has for many years enabled a settlor to benefit a group of beneficiaries without giving to any one of them such an interest as will attract duty on the death of the beneficiary. This situation is discontinued in respect of deaths occurring after the coming into effect of the Finance Act 1969.

Apart from the Finance Act 1969, it has been held that there is a passing of property when a discretionary trust terminates, and liability to duty when this occurs on a death or at a period ascertainable only by reference to the death; as when the qualification for membership of the class changes on a death,[46] or when the discretionary trust comes to an end, and beneficiaries become entitled to specific interests.[47] It was held, however, that, as individual members had no interest there was no passing on the death of an individual member of the discretionary class.[48] The class as a whole had an interest in the sense that, if all the members were all of full age and absolutely entitled, they could call for a transfer to them.[49] But an individual member, being dependent for any benefit upon the exercise of this discretion by the trustees in his favour, was not entitled to any interest in the fund, at least if the trustees had power to accumulate and need not pay the income to anyone.[50] The beneficiary had no more than a right that the trustees should consider his claims from

[43] *Oakes* v. *Stamp Duties Commissioner for N.S.W.* [1954] A.C. 57.
[44] *Post*, p. 367.
[45] F.A. 1894, as amended by F.A. 1969, s. 36 (2); Sched. 21, Part V.
[46] *Burrell and Kinnaird* v. *Att.-Gen.* [1937] A.C. 286; *Public Trustee* v. *I.R.C.* [1966] A.C. 520 (*sub nom. Re Kirkwood*).
[47] *Scott* v. *Att.-Gen.* [1937] A.C. 174; *Gartside* v. *I.R.C.* [1968] A.C. 553.
[48] *Gartside* v. *I.R.C.* [1968] A.C. 553; *I.R.C.* v. *Holmden* [1968] A.C. 685.
[49] *Re Smith* [1928] Ch. 915; Nathan & Marshall, No. 40.
[50] See *Gartside* v. *I.R.C.*, *supra*, at pp. 605–606, 616–621; *I.R.C.* v. *Holmden*, *supra*, at p. 714.

more than a right that the trustees should consider his claims from time to time.[51] It was thought that there was an exception in the case of the death of the penultimate member of the class. The argument was that on the death of the penultimate member of a class, the survivor was no longer dependent upon the trustees' discretion, but became entitled to the income, and that this was a "passing" for estate duty purposes. In *Re Weir's Settlement Trusts*,[52] however, the Court of Appeal held that there was no "passing." Before 1969 duty was payable on the death of the last member, but the new section 2 (1) (*b*) treats all members alike, so long as their benefit depends upon the exercise of the trustees' discretion.

Legislation to terminate this avoidance of estate duty, expected for some years, has now arrived. The Finance Act 1969, in short, provides [53-61] that duty shall be charged on the capital of the fund upon the death of a member of the discretionary class, calculated on the proportion which the income he has received bears to the whole income of the trust during what is called the "relevant [seven-year] period." No duty, however, is chargeable if he ceased to be eligible or if the property ceased to be settled seven years before his death, unless during that period he was not entirely excluded from possession and enjoyment. The period of calculation is not in any case to be taken back beyond April 15, 1963.

C. Duration of Discretionary Trusts

All private trusts are limited by the rule against perpetuities and the amendments thereto in the Perpetuities and Accumulations Act 1964. Discretionary trusts provide a special situation for the application of the rule, for, under a discretionary trust, a beneficiary's entitlement to property does not vest until the trustees exercise their discretion in favour of that particular beneficiary. A discretion exercised outside the period is void [62]; and a discretionary trust can only exist for the duration of the perpetuity period.

To be valid therefore, the discretionary trust must terminate before the end of the period. This is normally done by postulating the "trust period" at the conclusion of which the discretionary trust will terminate, and providing for a gift over on fixed trusts which will themselves vest within the perpetuity period. Until 1964, the duration of discretionary trusts was usually governed by a "royal lives" clause.[63] Since that date, the alternative period of eighty years per-

[51] *Gartside* v. *I.R.C.*, *supra*, at p. 606.
[52] *The Times*, July 31, 1969.
[53-61] The "substituted" s. 2 (1) (*b*) (iii); F.A. 1969, ss. 36 (2), 37 (3); New L.J., July 31, 1969 (A. D. Lawton).
[62] *Re Coleman* [1936] Ch. 528.
[63] See M. & W., pp. 227–228; Cheshire, p. 241; Morris and Leach, p. 67.

mitted by the Perpetuities and Accumulations Act 1964 is sometimes employed.[64]

Many discretionary trusts are in fact terminated at the conclusion of the period of accumulation.[65] This is because some of the advantages of discretionary trusts then come to an end; first, because the income must then be distributed, and the beneficiaries may already be paying high rates of surtax on their income; secondly, because the freedom from estate duty liability on the death of one of the discretionary beneficiaries [66] was only established beyond doubt in the case of discretionary trusts containing a power to accumulate.[67]

D. Income Tax and Surtax

The settlor's plan is to reduce estate duty on his and other deaths so far as he can, and also liability to income tax and surtax as much as possible. Before the settlement, the income from the capital was the settlor's; in his hands it would be liable to income tax, and in respect of income additional to the first £2,000 of the settlor's income, to surtax also.[68] The establishment of the settlement can give some relief. The income of the settlement is liable in the trustees' hands to income tax, but not to surtax. Income which is distributed is normally treated as the income of the recipient. Since April 5, 1969, however, the unearned income from all sources of an infant who is unmarried and not regularly working is to be treated as the income of his or her parents.[69-71] This provision applies to income paid to or for the benefit of the infant, but not to income which is accumulated. There are situations, however, where even accumulated income is treated as that of the settlor if the settlement is not an "irrevocable" settlement.[72] Further, sections 404 and 405 [73] provide for income under certain types of revocable settlements and under settlements under which the settlor retains an interest to be treated as the income of the settlor. The same rule applies where some or all of the income may be paid to the settlor or his spouse under a discretionary trust.[74] There is however no objection for these purposes to the reservation of a benefit to the *widow* of the settlor.[75]

[64] Potter and Monroe, p. 175 suggest that there is doubt whether the eighty-year period can be applied in this situation.
[65] Under an express power to do so. For periods of accumulation, see *post*, p. 190.
[66] Under the law in force prior to F.A. 1969.
[67] *Gartside* v. *I.R.C.* [1968] A.C. 553; *ante*, p. 187.
[68] F.A. 1953, s. 12 (1).
[69–71] F.A. 1968, s. 15; F.A. 1969, s. 17.
[72] "Irrevocable" in this context bears its normal meaning and is also further defined in s. 399, which (as amended by F.A. 1958, s. 20 (5)) must be consulted for further details.
[73] I.T.A. 1952. See also Potter & Monroe, pp. 98–99.
[74] F.A. 1958, s. 22.
[75] *Vestey's Executors* v. *I.R.C.* [1949] 1 All E.R. 1108.

5. Accumulations

The settlement should include a power to accumulate surplus income. Without such a power, the trustees would be compelled to pay the income to some or all of the beneficiaries [76]; and if all of them were infants, the income would be treated for tax purposes as that of the infant's parents. This, as we have seen, will also be the case where income is applied for the maintenance or benefit of infant and unmarried children not regularly working.

Accumulation is possible for certain permitted periods only. These are (by the Law of Property Act 1925, s. 164):

> "(*a*) the life of the grantor or settlor; or
> (*b*) a term of twenty-one years from the death of the grantor, settlor or testator; or
> (*c*) the duration of the minority or respective minorities of any person or persons living or *en ventre sa mère* at the death of the grantor, settlor or testator; or
> (*d*) the duration of the minority or respective minorities only of any person or persons who under the limitations of the instrument directing the accumulations would, for the time being, if of full age be entitled to the income directed to be accumulated."

To which the 1964 Act added, in respect of instruments coming into effect after July 16, 1964:

> "(*e*) a term of twenty-one years from the date of the making of the disposition; and
> (*f*) the duration of the minority or respective minorities of any person or persons in being at that date."

The settlor may select whichever period he wishes [77]; there is, however, a danger that if either of the first two periods in the Law of Property Act 1925, s. 164, is chosen, duty will be payable in that the accumulations end on the death of the settlor. Estate duty liability in this situation is retained in the 1969 Act, with special provision being made for cases where only part of the income is accumulated.[78] It will be seen that the twenty-one-year period in gross provided by the 1964 Act offers to settlors a more advantageous period for accumulation in discretionary trusts created *inter vivos*. We have seen that (*a*) and (*b*) were not satisfactory because of

[76] Subject to T.A. 1925, s. 31; *post*, p. 354.
[77] If the settler chooses a period which is in excess of those permitted, the accumulation will be invalid only as to the excess. The court will select whichever period is the most appropriate to the settlor's intent: Morris and Leach, p. 272 *et seq.*
[78] The "substituted" F.A. 1894, s. 2 (1) (*b*) (iv); F.A. 1969, ss. 36 (2), 37 (4).

the risk of a "passing" on the settlor's death; (*c*) refers only to the infancy of persons living at the settlor's death, and is not therefore suitable for *inter vivos* trusts; and (*d*) only applies where the beneficiaries would be *entitled* to the income at twenty-one, and is not therefore appropriate for discretionary trusts which are intended to continue after the beneficiaries attain that age. The twenty-one-year period of accumulation, given by the 1964 Act, enables this to be done.

6. Form of Discretionary Trusts

From these complicated explanations, the form of a discretionary trust should emerge. The matter is best understood by a study of precedents of discretionary trusts.[79] A few of the more essential points may be mentioned here.

A. Discretion not Exercisable beyond Period of Perpetuity

The trustees' discretion must be made exercisable for the period of perpetuity, and no longer.[80] The trust must therefore provide for the vesting of the property for fixed interests in beneficiaries then ascertained.[81]

B. Selection of Members of the Class of Beneficiaries

It is inadvisable for the settlor to select too narrow a discretionary class. Before 1969, duty was payable on the full value of the fund on the death of the last member; but this liability does not survive the 1969 Act.[82] The other advantages, however, may be lost. It is inadvisable also to select too wide a class, for discretionary trusts are trusts; the rules relating to certainty of trusts apply; and the members of the class of beneficiaries must therefore be sufficiently certain that it is possible to ascertain at any given time exactly who are the members of the class of beneficiaries.[83] It is common to restrict the class of beneficiaries to named persons, children, grandchildren and remoter issue of named persons, their spouses and other persons who can be exactly described,[84] and perhaps certain charities also.

A settlor who wishes to give his trustees power to exercise their discretion in favour of a class which is so small that there is a risk of total extinction, or so large that it might be uncertain, may give

[79] Potter & Monroe, p. 197 *et seq.*; Morcom, p. 378 *et seq.*
[80] *Re Coleman* [1936] Ch. 528.
[81] *Ante*, p. 126.
[82] Because there is no longer a "passing" under s. 1 independently of s. 2. F.A. 1969, s. 36 (1); *ante*, p. 183, note 17.
[83] *Ante*, p. 125; *Re Ogden* [1933] Ch. 678.
[84] Potter & Monroe, p. 180.

the trustees a *power* to appoint in favour of such persons, with a gift in default on discretionary trusts. Before 1969, this would effect an estate duty saving, for there would be no "passing" on the death of an object of a power.[84a] As we have seen, the rules relating to certainty in respect of powers are much less strict.[85] In the case of a power, the requirement of certainty is satisfied if it is possible to say of any given postulant whether or not he qualifies.[86] A settlor can take advantage of this situation by giving to the trustees a *power* to apply the income or capital or both (as desired) in favour of members of the class of appointees, and subject thereto, and in default of appointment, upon discretionary trusts for a class of beneficiaries which is large enough to minimise the risk of the extinction of the class, and certain enough to comply with the rule of certainty under the law of trusts. The settlor should not be included in the class of beneficiaries.[87]

C. Powers and Trusts

It is appropriate at this stage to underline the importance of making clear beyond doubt whether a particular limitation is a power or a trust. A gift over in default necessarily means that the limitation must be a power and not a trust.[88] In *Re Gestetner Settlement* [89]:

> A trust fund was held by trustees on trust for such members of a specified class as the trustees might appoint. The specified class included a wide range of persons such as would be too uncertain to be beneficiaries of a trust, but certain enough to be the objects of a power. Subject to "any and every exercise of the power" given to the trustees, the trustees were to hold the trust fund on trust for such of the children of the settlor as attained the age of 21 years . . . and in default of any such child on trust for a named charity.
>
> The question was whether the trusts were void for uncertainty. Harman J. upheld them. On the proper construction of the deed, there was no duty to apply the trust moneys in favour of the wide class; in that respect the trustees had a mere power; this was shown by the fact that there was a gift over in default. And the ultimate trusts were valid.

84a See now F.A. 1969, ss. 36 (2), 37 (3).
85 *Ante*, pp. 105, 125.
86 *Re Gulbenkian's Settlements* [1968] 3 W.L.R. 1127, *ante*, p. 106.
87 *Att.-Gen.* v. *Heywood* (1887) 19 Q.B.D. 326; *Att.-Gen.* v. *Farrell* [1931] 1 K.B. 81.
88 *Ante*, p. 97.
89 [1953] Ch. 672.

Here therefore there was a power with a gift in default upon fixed trusts. There is no objection to a power with a gift in default upon discretionary trusts, the ultimate gift upon fixed trusts taking place prior to the expiration of the perpetuity period.

D. Other Powers in the Trustees

Other powers may of course be given to the trustees; including the usual administrative powers. Further it is common to give to them power to appoint on further trusts, including discretionary and protective trusts, and to give them full power of delegation.[90] This makes possible a resettlement on new trusts before the end of the perpetuity period, or at any time at which it become advantageous for fiscal or other reasons, to do so. Such an appointment must keep within the perpetuity period as measured from the date of the original settlement.[91] And it may not provide for accumulation for any period beyond that which was available to the original settlor.[92] The periods of perpetuity and of accumulation will only start again if appointments are made to a beneficiary who resettles; but such a settlement is of course at risk in respect of the settlor's death within seven years as regards liability to estate duty upon the whole of the fund so appointed.

It is useful to give power also to transfer the trust fund or part thereof to foreign trustees, in order to avoid liability to capital gains tax. This tax is payable in respect of capital appreciation of funds (the tax being at the rate of 30 per cent. of the amount of such appreciation) by persons who are resident or ordinarily resident in the United Kingdom.[93] In the case of settled property capital gains tax is payable on the death of the life tenant,[94] or when a person becomes absolutely entitled as against the trustees.[95] If, as with a discretionary trust, there is no life tenant, capital gains tax is payable every fifteen years.[96] The trustees are liable for the tax. If however they are not resident nor ordinarily resident in the United Kingdom, they are not liable; but if the settlor is domiciled and either resident or ordinarily resident in the United Kingdom (or was so domiciled or resident when he made the settlement) liability arises in respect of beneficial interests held by beneficiaries domiciled and either resident or ordinarily resident in

90 See Hallett, *Conveyancing Precedents*, p. 772.
91 *Pilkington* v. *I.R.C.* [1964] A.C. 612.
92 Because the appointors cannot be given powers in excess of those available to the settlor.
93 F.A. 1965, s. 20 (1).
94 *Ibid.*, s. 25 (4).
95 *Ibid.*, s. 25 (3).
96 *Ibid.*, s. 25 (7)

the United Kingdom in proportion to their interests under the trust.[97] Special provision is made in relation to beneficiaries under discretionary trusts by which capital gains tax is payable in respect of payments of capital and, in some cases, of income also.[98]

E. The Beneficiaries as Trustees

It is inadvisable to make one of the members of the class of beneficiaries a trustee. If such a person should, by the death of the others, become sole trustee, he would be able to exercise his discretion in his own favour and would be a person who is competent to dispose of the property under Finance Act 1894, s. 2 (1) (*a*), and duty would be payable on his death.[99]

[97] *Ibid.*, s. 42 (1) (2) (4).
[98] *Ibid.*, s. 42 (3).
[99] As an appointment to one's self; *Re Penrose* [1933] Ch. 793. The problem can also be met by providing that the power may only be exercised if there are at least two trustees.

CHAPTER 11

TRUSTS OF IMPERFECT OBLIGATION. PURPOSE TRUSTS

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1. THE GENERAL PROBLEM

ONE of the reasons for requiring certainty of objects of a trust is to ensure that there will be ascertainable persons who are interested in the enforcement of the trust, and able to insist upon it.[1] The question for consideration in this chapter is whether, in the absence of such beneficiaries, a trust for a non-charitable purpose should be permitted. Must it be void? Or should the trustees be allowed to carry it out if they wish?

First, however, it is necessary to clarify the borderline, sometimes obscure, between trusts for beneficiaries and purpose trusts; for example, a trust to apply money for certain purposes in favour of certain persons.[2] For instance, a trust for the planting of trees on certain settled estates has been treated as being for the benefit of the persons entitled to the estate.[3] And recently a trust for the maintenance of land as a recreation or sports ground for the benefit of employees of a firm was held a valid trust for them as beneficiaries.[2] On the other hand, a trust for an abstract purpose, or for purposes where the benefit to individuals is so "indirect or intangible . . . as not to give those persons any *locus standi* to apply to the court to enforce the trust,"[4] is not a trust in favour of ascertainable beneficiaries; such a trust is usually held void.

[1] Discretionary trusts (*ante*, Chap. 10) do not conflict with this statement. Although no individual member of the discretionary class can insist on payment being made to him, he can require the trustees to give consideration to him when deciding upon the exercise of their discretion (*Gartside* v. *I.R.C.* [1968] A.C. 553); and the class as a whole, if adult, *sui juris*, etc., can demand the capital (*Re Smith* [1928] Ch. 915; Nathan & Marshall, No. 40).

[2] *Re Denley's Trust Deed* [1969] 1 Ch. 373; *ante*, p. 129.

[3] *Re Bowes* [1896] 1 Ch. 507; *cf. Re Aberconway's S.T.* [1953] Ch. 647.

[4] *Re Denley's Trust Deed*, *supra*, at p. 383.

The story begins with *Morice* v. *Bishop of Durham* [5]:

> A testatrix bequeathed her personalty to the Bishop of Durham upon trust to pay her debts and certain legacies, and to dispose of the residue to "such objects of benevolence and liberality as the Bishop of Durham in his own discretion shall most approve of." The next-of-kin claimed the residuary gift on the ground that it was not a gift for charitable purposes. The Bishop, however, wished to carry out the trust according to its terms. All the arguments for the Bishop, and the judgments both of Grant M.R. and of Lord Eldon turned entirely on the question whether the gift was charitable. It was held that it was not, as the words "benevolence" and "liberality" are not synonymous with "charity" [6] The trust failed and the residuary gift fell to be distributed amongst the next-of-kin.

It was not argued that the trust might be upheld as a non-charitable purpose trust, but the case has been regarded as ruling out this possibility. In particular, reliance has come to be placed on the following dictum of Sir William Grant M.R.[7]: "There can be no trust, over the exercise of which this Court will not assume a control; for an uncontrollable power of disposition would be ownership, and not trust. If there be a clear trust, but for uncertain objects, the property, that is the subject of the trust, is undisposed of . . . But this doctrine does not hold good with regard to trusts for charity. Every other trust must have a definite object. There must be somebody, in whose favour the Court can decree performance." But this celebrated dictum is not as clear as it might be. It talks about control, certainty of objects, and finally somebody who can demand specific performance in his favour. In *Re Dean* [8] North J. emphasised the first two of these factors, and did not regard the absence of an ascertainable human beneficiary as fatal. Provided the object of the trust was clear (whether this was a provision for a tomb, or for an animal, or for some other non-charitable purpose), and provided there was some ascertained person entitled in default who could, if necessary, complain to the court about *maladministration*, it did not matter in his view, that there was nobody who could demand performance. The trustees would not be compelled to carry out the trust, but neither would they be prevented from doing so if they wished to carry it out.

[5] (1804) 9 Ves.Jr. 399; (1805) 10 Ves.Jr. 522; *Re Wood* [1949] Ch. 498 (gift to the "week's good cause" held invalid); *Bowman* v. *Secular Society* [1917] A.C. 406.

[6] *Post*, p. 276.

[7] (1804) 9 Ves.Jr. 399 at pp. 404–405.

[8] (1889) 41 Ch.D. 552; *post*, p. 197; *Re Thompson* [1934] Ch. 342.

2. The "Monument" and "Animal" Cases

North J.'s view has not won general acceptance in recent years [9]; but there are a number of cases in which purpose trusts have been upheld. These will not now be extended,[10] but they have not been overruled. They are regarded as "concessions to human weakness or sentiment," [11] and have been called "troublesome, anomalous and aberrant." [12] Trusts have been upheld for the erection of tombs or monuments,[13] and for their maintenance for a limited period of time [14]; as have trusts for the maintenance of the testator's animals.[15] In *Re Dean* [16]:

> An annual sum of £750 was left to trustees, for the maintenance of the testator's horses and dogs for fifty years if any of them should so long live. North J. upheld the gift, holding that the trustees were at liberty to spend the money on the animals, although no-one could compel them to do so.
>
> *Re Thompson* [17] may come into this category, although the gift was for the furtherance of fox-hunting, and was rather for the persecution than for the preservation of animals. The trustee was willing to apply the money for the stated purpose; Clauson J. allowed him to do so, giving the residuary legatee power to apply if the legacy should not be used for the purpose stated.

3. Duration

A purpose trust, even of the limited kind now allowed, cannot be upheld for an indefinite or perpetual period. This is not really an application of the perpetuity rule, which is concerned with remoteness of vesting. The problem in respect of purpose trusts is dealt with by a rule, which can quite simply be called a rule against perpetual duration, which holds void a trust which could cause property to be applied for non-charitable purposes for longer than a

[9] *Re Astor's S.T.* [1952] Ch. 534; Nathan & Marshall, No. 27; *Re Endacott* [1960] Ch. 232; Nathan & Marshall, No. 28; *Leahy* v. *Att.-Gen. for N.S.W.* [1959] A.C. 457; Nathan & Marshall, No. 30; (1950) 14 Conv.(N.S.) 374 (A. K. R. Kiralfy); (1953) 6 C.L.P. 151 (O. R. Marshall). *Re Shaw* [1957] 1 W.L.R. 729.

[10] *Re Endacott*, *supra*, at p. 246.

[11] *Per* Roxburgh J. in *Re Astor's S.T. supra*, at p. 547.

[12] *Per* Harman L.J. in *Re Endacott*, *supra*, at p. 251.

[13] *Trimmer* v. *Danby* (1856) 25 L.J.Ch. 424; *Mussett* v. *Bingle* (1876) W.N. 170.

[14] *Pirbright* v. *Salwey* [1896] W.N. 86; *Re Hooper* [1932] 1 Ch. 38 (gift for upkeep of graves, monuments, etc., "so long as they legally can do so," held valid for 21 years from the testator's death).

[15] *Pettingall* v. *Pettingall* (1842) 11 L.J.Ch. 176; *Re Dean* (1889) 41 Ch.D. 552.

[16] (1889) 41 Ch.D. 552.

[17] [1934] Ch. 342; there was also a power to spend the capital; *ante*, p. 196.

period of lives in being [18] and twenty-one years.[19] If the gift provides for a purpose trust to continue for "as long as the law allows," it will be upheld for twenty-one years.[20] But if it is not confined within the permitted limits (expressly or necessarily) [21] it is wholly void. and will not be cut down to twenty-one years.[22] The rule is unaffected by the Perpetuities and Accumulations Act 1964.[23]

4. Return to Grant M.R.'s Dictum [24]

Later cases have returned to the view that a trust, being obligatory, and not a matter of choice, or discretion in the trustees, must have a human beneficiary who can enforce it. Grant M.R.'s dictum, however confusing, is accepted as authoritative. In general, trusts for purposes are valid only if they are charitable.

> In *Re Astor's Settlement Trusts*,[25] a settlement was made, expressly limited by a period of lives, for a number of non-charitable purposes, including "the maintenance of good relations between nations . . . the preservation of the independence and integrity of the newspapers" and other similar purposes in favour of independent newspapers. Roxburgh J. held the trust void; both on the ground that a trust must have a beneficiary who can enforce it and also on the ground of uncertainty.[26]
>
> In *Re Endacott*,[27] the Court of Appeal held void a gift of residuary estate "for the purpose of providing some useful memorial to myself." The court refused to treat the limitation as coming within the anomalous group of "monuments" cases. The exceptions to Grant M.R.'s rule, they said, "ought not to be extended. So to do would be to validate almost limitless heads of non-charitable trusts, even though they were not (strictly speaking) public trusts . . . and . . . that result would be out of harmony with the principles of our law." [28]

18 They must be human lives: *Re Kelly* [1932] Ir.R. 255; *Re Howard, The Times*, October 30, 1908 (trust for a parrot during the lifetime of specified servants).
19 See *Re Astor's S.T.* [1952] Ch. 534; Nathan & Marshall, No. 27, where the point seems to have been assumed.
20 *Pirbright* v. *Salwey* [1896] W.N. 86; *Re Hooper* [1932] 1 Ch. 38.
21 *Re Haines, The Times*, November 7, 1952 (judicial notice taken that cats do not live longer than 21 years).
22 *Re Compton* [1946] 1 All E.R. 117. The decision in *Re Dean* (1889) 41 Ch.D. 552 is for this reason unsupportable.
23 s. 15 (4).
24 *Ante*, p. 196.
25 [1952] Ch. 534; see also the general statements of principle in *Leahy* v. *Att.-Gen. for N.S.W.* [1959] A.C. 457; Nathan & Marshall, No. 30.
26 *Ante*, p. 125 *et seq.*
27 [1960] Ch. 232; Nathan & Marshall, No. 28.
28 *Ibid.* at p. 246 *per* Evershed M.R.

5. Unincorporated Associations [29]

A problem arises with an unincorporated association whose object is the furtherance of a particular purpose. If the purpose is not charitable, who is beneficially entitled to the property of the association? The association itself cannot be, for it is not a "person" recognised by the law. Yet if no human beings are directly benefited, how is the association to hold property?

This problem remained dormant for some time because there was some authority to suggest that an unincorporated association could hold property on trust if it had power to expend its property though only on the purposes for which it existed.[30] This answered any objection on the ground of "perpetuity," [31] or so it was thought. But this answer is not consistent with the opinion of the Privy Council in *Leahy* v. *Att.-Gen. for N.S.W.*,[32] and a number of difficulties remain.

> In *Re Price*,[33] a testatrix gave a part of her residuary estate to the Anthroposophical Society in Great Britain "to be used at the discretion of the Chairman and Council of the Society for carrying on the teachings of the founder, Dr. Rudolph Steiner." Cohen J. held that this was not a beneficial gift to the Chairman and Council members, but could be spent only on the specific purposes mentioned. Nevertheless he held that there was no perpetuity involved since the capital could be spent and the gift was valid.

It may well be that since *Leahy* v. *Att.-Gen. for New South Wales*,[32] such a trust would be held invalid. It lacks human beneficiaries who can claim performance and among whom the capital could be distributed. The fact that the capital can be spent does not answer this objection. If that is correct, unincorporated associations whose organisation consists, not of persons beneficially entitled but of (say) an executive council and subscribers, are in a difficulty. Unless a gift to such an association can be construed as a beneficial gift to the members of its executive council, or to all its current subscribers (assuming lists are kept) there will be no beneficiaries, and the gift seems to be void. The inclusion in the gift of phrases such as "for the purposes of the association" make it difficult to construe a gift as one to individuals beneficially, and may be fatal—unless they can be construed as surplusage and ignored.

[29] *Ante*, p. 127.
[30] *Re Drummond* [1914] 2 Ch. 90; *Macaulay* v. *O'Donnell* [1943] Ch. 435n.
[31] If the income only had been given for application to the purposes of the association, and not restricted to the period of perpetuity, it would be void; *Carne* v. *Long* (1860) 2 De G.F. & G. 75. *Ante*, p. 128.
[32] [1959] A.C. 457; Nathan & Marshall, No. 30; *ante*, p. 128; *cf. Re Ogden* [1933] Ch. 678 at p. 681.
[33] [1943] Ch. 422.

6. Nature of Purpose Trusts. Trusts and Powers [34]

In order to facilitate the carrying out of useful purposes, it has been suggested that purpose trusts are closer to powers than to trusts, and should be construed as such. This would enable many purposes to be performed which are not possible by means of a trust. The absence of persons able to enforce it would cease to be a problem; for, as explained above,[35] no one *enforces* a power. And the rules for certainty would be less strict. Both these objections would be answered in many of the cases on purpose trusts [36] if the trust could have been construed as a power. Invalid trusts however are not construed as powers [37]; and there is no reported English decision dealing with a power, created as such, to apply money for a purpose for a limited time.[38]

7. Is it Desirable to Uphold Purpose Trusts?

The arguments in favour of upholding purpose trusts often emphasise that these trusts embody purposes which are beneficial to the community, without however qualifying as charitable trusts.[39] We will see that the definition of charity is very strict, if not rational or consistent. It has to be strict; for a charitable trust enjoys freedom, not only from the rules of certainty, enforceability by beneficiaries and perpetual duration, but also freedom from taxation. The tax aspect plays of course an increasingly dominant part in the definition of charity.[40] Relief from the burdensome taxation of the present day must rarely be given; but there is no half-way stage with these privileges; either a purpose trust is charitable and enjoys all these privileges, or it is private and enjoys none. The result is that the courts have refused validity to useful and reasonable purpose trusts because they were not so meritorious that they should exist permanently without ever paying tax on their income, such for example as the

34 Ames, *Lectures on Legal History*, p. 285; Morris and Leach, Chap. 12, and reference there quoted.

35 *Ante*, p. 95.

36 *Re Shaw* [1957] 1 W.L.R. 729; *Re Wootton's W.T.* [1968] 1 W.L.R. 681; perhaps also in *Re Astor S.T.* [1952] Ch. 534; Nathan & Marshall, No. 27.

37 *I.R.C.* v. *Broadway Cottages Trust* [1955] Ch. 20 at p. 31; *Re Endacott* [1960] Ch. 232; Nathan & Marshall, No. 28; *Re Wootton's W.T.* [1968] 1 W.L.R. 681 at p. 688.

38 But see *Gott* v. *Nairne* (1876) 3 Ch.D. 278; and *Re Douglas* (1887) 35 Ch.D. 472.

39 In *Re Astor's S.T.* [1952] Ch. 534; Nathan & Marshall, No. 27, Roxburgh J. said, at p. 542: "it is not possible to contemplate with equanimity the creation of large funds devoted to non-charitable purposes which no court and no department of state can control, or in the case of maladministration, reform."

40 (1956) 72 L.Q.R. 187 (G. Cross), especially at p. 203 *et seq.*; *per* Lord Upjohn in *Scottish Burial Reform and Cremation Society* v. *Glasgow Corp.* [1968] A.C. 138 at p. 153.

furthering of understanding between nations [41] or the profession of journalism.[42]

There is much to be said for the view that purposes which are beneficial to the community, though not charitable, should be upheld; without, that is, being required to conform to the rule requiring human beneficiaries to enforce the trust; and perhaps also without complying with some of the other rules applicable to private trusts. It is, in other words, not necessary that the issue of validity of these trusts should be governed by the same criteria as those which give fiscal privileges as well.

The formation of a new category on these lines would of course raise new problems. Apart from the question of the length of time for which they would be permitted to endure, it would be necessary also to establish a formula to determine which were and were not useful and beneficial to the community. On this there is some guidance in the form of authority for rejecting useless or capricious projects.

> In *Brown* v. *Burdett*,[43] the testator devised a freehold house to trustees upon trust to block up almost all the rooms of the house, and the coach house for twenty years, and, subject thereto, to a devisee in fee. Bacon V.-C. decided that he must "unseal" this "undisposed of property," and declared that there was an intestacy as to the period of twenty years.

A similar question would arise if purpose trusts were construed as powers. And the difficulty which, as we will see, has been experienced in determining the boundaries of "charity" does not augur well for the precise definition of a category of "useful and beneficial."

8. Other Methods of Carrying out a "Purpose"

It is possible to achieve, by roundabout means, the objective of a purpose trust.

A. Incorporation

A society may be incorporated to advance such purposes; and there is no problem of perpetuity as a corporation can always be dissolved.

[41] *Re Strakosch* [1949] Ch. 529.
[42] *Re Astor's S.T.* [1952] Ch. 534; Nathan & Marshall, No. 27.
[43] (1882) 21 Ch.D. 667. See also two Scottish cases, *M'Caig* v. *University of Glasgow*, 1907 S.C. 231; and *M'Caig's Trustees* v. *The Kirk-Session of the United Free Church of Lismore*, 1915 S.C. 426; and an American case, *Kelly* v. *Nicholls*, 17 R.I. 306; 21 Atl. 906 (1891); 18 R.I. 62; 25 Atl. 840 (1892).

B. Conveyancing Devices

Purposes can be furthered by the use of conveyancing devices. These are easier to employ in reference to a specific purpose such as the maintenance of a particular tomb. One such method is the utilisation of the rule in *Christ's Hospital* v. *Grainger* [44]; and here the condition to maintain the tomb is valid in perpetuity; the rule is unaffected by the Perpetuities and Accumulations Act 1964. A similar result could have been produced before 1964 by making use of determinable interests [45]; and even now it is possible to frame a limitation which will in effect secure the maintenance of a tomb for the best part of one hundred years.[46]

9. Suggested Solution

These various considerations have not been weighed by the courts, which have merely taken refuge in Sir William Grant's dictum.[47] It is submitted that gifts for non-charitable purposes are desirable, subject to their (a) being for purposes which are reasonably certain; (b) being capable of a measure of control by someone interested in default [48]; (c) being subject to the rules against perpetual duration [49]; and (d) being subject to the doctrine illustrated by *Brown* v. *Burdett*.[50] But it would be preferable to validate them as a form of power than as a form of trust.

It is of considerable interest that, in Canada, the step has been taken of legislating to establish purpose trusts. The relevant provisions of the Ontario Perpetuities Act 1966 are worth citation in full. Section 16 provides:

> (1) A trust for a specific non-charitable purpose that creates no enforceable equitable interest in a specific person shall be construed as a power to appoint the income or the capital, as the case may be, and, unless the trust is created for an illegal purpose or a purpose contrary to public policy, the trust is valid so long as, and to the extent that it is exercised either by

44 (1849) 1 Mac. & G. 460, *post*, p. 254; *Re Tyler* [1891] 3 Ch. 252.

45 *Re Chardon* [1928] Ch. 464; *Re Chambers' W.T.* [1950] Ch. 267.

46 *e.g.*, the limitation of a substantial sum to X, with a gift over to Y on X's failure to maintain a tomb within a period defined either in relation to a number of years not exceeding 80 or to royal lives. It is important in these limitations not to put the tomb as an object of the trust, but only as a cause of the gift over taking effect. *Cf. Re Dalziel* [1943] Ch. 277; Nathan & Marshall, No. 54; with *Re Wightwick's W.T.* [1950] Ch. 260 and *Re Chambers' W.T.* [1950] Ch. 267.

47 *Ante*, p. 196.

48 *Re Thompson* [1934] Ch. 342.

49 *Ante*, p. 197; *post*, p. 240.

50 (1882) 21 Ch.D. 667; *ante*, p. 201.

the original trustee or his successor, within a period of twenty-one years, notwithstanding that the limitation creating the trust manifested an intention, either expressly or by implication, that the trust should or might continue for a period in excess of that period, but, in the case of such a trust that is expressed to be of perpetual duration, the court may declare the limitation to be void if the court is of opinion that by so doing the result would more closely approximate the intention of the creator of the trust than the period of validity provided by this section.

(2) To the extent that the income or capital of a trust for a specific non-charitable purpose is not fully expended within a period of twenty-one years, or within any annual or other re-curring period within which the limitation creating the trust provided for the expenditure of all or a specified portion of the income or the capital, the person or persons, or his or their successors, who would have been entitled to the property com-prised in the trust if the trust had been invalid from the time of its creation, are entitled to such unexpended income or capital.

CHAPTER 12

RESULTING TRUSTS

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1. GENERAL

RESULTING trusts occur where equity regards property which is held by T (a trustee) as belonging in equity to the person who has transferred it to, or caused it to be vested in, T. This is not an exhaustive definition, and serves only to indicate that there is no greater link to the contents of this chapter than that they all conform to this pattern. There is no doctrinal unity to resulting trusts. Whether they are based upon the intention of a donor or testator, or whether they are imposed by equity in certain cases regardless of intention, is, for our present purpose, immaterial.

Resulting trusts are not subject to all the rules of express trusts. Their creation is not dependent on compliance with formalities [1]; their objects do not need to be immediately identifiable [2]; an infant may be a resulting trustee.[3] But since 1964, they are subject to the rule against perpetuities.[4] We will examine a number of the diverse situations in which resulting trusts arise. The categories overlap, and are selected for convenience only.

2. WHERE A TRUST FAILS

In *Essery* v. *Cowlard*,[5] a pre-nuptial settlement was executed under which the intended wife conveyed property to trustees to

1 L.P.A. 1925, s. 53 (2).
2 *Re Gillingham Bus Disaster Fund* [1958] Ch. 300; Nathan & Marshall, No. 62.
3 *Re Vinogradoff* [1935] W.N. 68; Nathan & Marshall, No. 19.
4 Perpetuities and Accumulations Act 1964, s. 12.
5 (1884) 26 Ch.D. 191; *Quistclose Investments Ltd.* v. *Rolls Razor Ltd.* [1968] 3 W.L.R. 1097; *ante*, p. 90.

hold on trust for herself, her intended husband and the issue of the marriage. The marriage never took place, but the parties cohabited and three children were born. Six years later the plaintiffs successfully reclaimed the property on the ground that the contract to marry no longer existed, and the trusts were at an end.

In *Re Ames' Settlement* [6] property had been settled by the husband's father upon the trusts of a marriage settlement, and the marriage took place. Eighteen years later the wife obtained a decree of nullity (which had the effect of declaring the marriage void *ab initio*). Vaisey J. decided, after the husband's death, that the property was held on a resulting trust for the executors of the settlor.

The principle of these cases is not that any new equity arises to create a resulting trust, but that the beneficial interest has never left the settlor. But many difficulties may be involved. What would be the position if property were settled on a widow, determinable on her remarriage, and the "remarriage" were annulled. Would *Re Ames' Settlement* [6] demand that she could reclaim the property once more from the settlor's estate?[7] Logic should not here be pushed further than the occasion demanded. Different branches of the law rely on different policy considerations [8] and there is no one clear ruling on the effects of a void marriage and the annulment of a voidable one.

3. Cases Where the Equitable Interest is not Fully Disposed of

The resulting trust may be invoked as a device of equitable surgery, to provide a solution in cases where unskilful draftsmanship leaves the beneficial interest wholly or partially undisposed of.

A. Complete or Partial Failure

Where there is a transfer by A to B expressly "on trust," but without any declaration of trust, the property is held on resulting trust for the transferor.[9] An exception is the case of half-secret trusts, as we have seen,[10] where parol evidence can be adduced to show what the intended trusts were. A resulting trust may also arise where the declaration of trust fails for uncertainty, or for failure to

[6] [1946] Ch. 217.
[7] *Cf. Ulrich* v. *Ulrich* [1968] 1 W.L.R. 180 at p. 185 *per* Lord Denning M.R.
[8] *Cf. Wiggins* v. *Wiggins* [1958] 1 W.L.R. 1013 and *R.* v. *Algar* [1954] 1 Q.B. 279; *Re D'Altroy's W.T.* [1968] 1 W.L.R. 120.
[9] *Re Pugh's W.T.* [1967] 1 W.L.R. 1262.
[10] *Ante*, pp. 157, 164.

embody it in writing where writing is required. Voidness for perpetuity raises other considerations however, owing to the operation of the " wait and see " rule.[11]

> In *Re Cochrane*,[12] a marriage settlement provided that the income of a fund should be paid to the wife during her life and so long as she should reside with the husband. On the determination of her interest, the income was to be paid to the husband. There was a power of appointment in favour of the children, and the children were entitled in default of appointment on the death of the survivor of the parents.
>
> The wife ceased to reside with the husband. Later the husband died. No appointment to the children had been made. There was thus a gap in the trusts, and a resulting trust for the remainder of the wife's life to the settlor.

The fact that an equitable interest is not fully disposed of may not become apparent until some time has elapsed since the constitution of the trust.

> In *Re Trusts of the Abbott Fund* [13] a sum of money was collected, to be used for the maintenance of two deaf and dumb ladies. It was held by Stirling J. that the ladies had no enforceable interests in the capital sum and that on their death, the sum remaining went on resulting trust to the subscribers.

The consequent problem becomes acute when the number of subscribers is great, and the gifts are mostly anonymous, as in *Re Gillingham Bus Disaster Fund*.[14]

> A number of marine cadets were injured or killed in an accident. The mayors of three towns appealed for subscriptions to a fund that would initially care for the disabled and thereafter be available for " worthy causes " in memory of those killed. More money was contributed than could be used for the first object (liability at common law for the accident having been accepted) and the second object failed as it had not been confined within the limit of legal charity. For this latter reason also, Charities Act 1960, s. 13, was inapplicable.[15] Harman J.

11 *Post*, p. 240. Gifts to charities also raise other considerations: *post*, p. 279 *et seq.*

12 [1955] Ch. 309.

13 [1900] 2 Ch. 326, *ante*, p. 129.

14 [1958] Ch. 300, *ante*, p. 129.

15 S. 13 provides the most convenient solution to this type of case. It is regrettable that it applies only when the gift is charitable, as many donors, especially those contributing by way of collection boxes, have no notion of the line between charity and non-charity. To impute to such donors any intent beyond an intent to give is unrealistic. The fund was finally wound up in 1965, when the remainder of the money was paid into court.

held that, despite the manifest inconveniences of such a decision, the ordinary presumption of a resulting trust arose and was not displaced. All subscribers, large or small, had the same intent, namely, to contribute to a specific object; on that object being attained or no longer furtherable, each donor had an interest by way of resulting trust. There was no evidence on which to arrive at any other conclusion. The suggestion that *bona vacantia* was a permissible result was regarded by Harman J. as taking the line of least resistance in a manner unauthorised by law. The case is authority for the strength of equity's initial presumption of resulting trusts, based on the intention to make the gift for specific objects.

B. Methods of Disposal

The manner in which contributions to such a fund are to be returned has been discussed in a group of cases dealing with what can be termed mutual help associations.

In *Re Printers' and Transferrers' Society*,[16] a society was founded to raise funds by weekly contributions to defend and support its members in maintaining reasonable remuneration for their labour, and to provide strike and lock-out benefits for members. The scale of payments varied according to the length of time a claimant had been a member of the society, and different conditions applied to printers and transferrers respectively. No provision was made by the rules for the distribution of the funds of the society on a dissolution. At the time of its dissolution the society consisted of 201 members, and its unexpended funds amounted to £1,000. The question, therefore, arose as to how the sum was to be distributed. The Attorney-General made no claim to the fund as *bona vacantia*. It was held that there was a resulting trust in favour of those who had subscribed to the fund, and that the money was divisible amongst the existing members at the time of the dissolution, in proportion to the amount contributed by each member to the funds of the society irrespective of fines, or payments made to members in accordance with the rules.

With this case it is necessary to contrast two others:

In *Cunnack* v. *Edwards*[17] a society was established in 1810 to raise a fund, by the subscriptions, fines and forfeitures of its

[16] [1899] 2 Ch. 184; *cf. Re St. Andrew's Allotment Association* [1969] 1 W.L.R. 229, at pp. 238–239 (*per capita* distribution among members of the Association).
[17] [1896] 2 Ch. 679. *Cf. Spiller* v. *Maude* (1881) 32 Ch.D. 158n., on the position of a fund within the ambit of charity.

members to provide annuities for the widows of its deceased members. By 1879 all the members had died. The last widow-annuitant died in 1892, the society then having a surplus unexpended fund of £1,250. It was held that there was no resulting trust in favour of the legal personal representatives of the members of the society, as each contributor had only a right that his widow should receive a portion, provided in proportion to the extent of her deceased husband's contribution to the fund; the society was not a charity, and the unexpended fund passed to the Crown as *bona vacantia.*

The crucial distinction [18] here is that in *Cunnack* v. *Edwards* [17] there were no existing members, the claim being made by their representatives, and the true construction was that each member on making a payment had so subscribed in favour of third parties, while in the former case the funds were for the benefit of members for the time being.

In *Re Hobourn Aero Components Air Raid Distress Fund,*[19] a fund was established during the Second World War for employees of a company who were on war service or who sustained loss in air raids. The fund was financed by voluntary subscriptions among the employees, but it was not charitable. After the end of the war, the fund was found to have a surplus. It was held that each contributor had an interest in the surplus by way of resulting trust in proportion to the amount he had contributed, but subject to adjustment in relation to any benefit he had received from the fund.

This conclusion is less convenient than the decision in *Re Printers' and Transferrers' Society*,[20] in that it concentrates attention on all the contributors to a society, however remote in time past,[21] and not on those who have retained a connection with it. There is much to be said for the simpler solution indicated by Byrne J., which, however, Cohen J. in the present case thought defensible only in cases where the ascertainment of the true entitlements would be too difficult.

C. Whether a Trust was Intended

So far in this section, we have been considering cases where a trust was clearly intended. But in other cases, there may be a ques-

18 It does not solve every case of course, for the issue in all cases is one of intent; *cf. Braithwaite* v. *Att.-Gen.* [1909] 1 Ch. 510.

19 [1946] Ch. 86 (affirmed *ibid.* at p. 194), see especially pp. 97–98; following *Re British Red Cross Balkan Fund* [1914] 2 Ch. 419.

20 [1899] 2 Ch. 184.

21 The effect of the Perpetuities and Accumulations Act 1964, s. 12, on this fact situation has not so far been considered. It is at least arguable that it is caught by the section, and this would be no bad thing.

tion whether a trust was intended at all, or whether it affected the entire assets vested in the trustees.

In this connection, directions contained in wills for the payment of debts have given rise to interesting decisions. A distinction is drawn by Lord Eldon in *King* v. *Denison* [22] between devises *charged with payment* of debts, and devises *on trust to pay* debts. In the former case it is assumed that the testator intended a beneficial interest for the devisee, subject to the payment of debts; in the latter case it is assumed that he intended merely to use the devisee as a vehicle for payment of the debts, and not to confer any benefit upon him. In the latter case there will, therefore, be a resulting trust of any surplus for the residuary devisee, or those entitled on intestacy; but there will be no resulting trust in the former case.

It must be remembered, however, that equity will not allow trustees themselves to give evidence that what was intended was a conditional gift.[23] An exceptional case is *Smith* v. *Cooke* [24] where:

> The partners in a business, by a deed reciting the inability of the firm to pay their creditors, assigned the business and property of the firm upon trust for the benefit of the creditors. The deed contained no provision in the event of a surplus, but it was held by the House of Lords, upon the construction of the deed, that there was an absolute disposal of all the proceeds to be realised for the benefit of the creditors, so that no resulting trust of surpluses for the benefit of the assignors could be implied. It was not a trust, but an assignment.

4. Voluntary Conveyances and the Presumption of Advancement

A. Presumption of Resulting Trust

One of the effects of the Statute of Uses was to prevent the operation of resulting uses. Previously, a resulting use arose on a voluntary conveyance which did not declare a use; the beneficial interest reverted to the grantor. After the Statute of Uses, the use was executed, and the grantor retained the legal estate; the conveyance was thus ineffectual. When equitable interests returned under the name of trusts, the beneficial interest might again return to the grantor, in cases both of realty and personalty, where the grantee

[22] (1813) 1 Ves. & Bea. 260; *ante*, p. 89; *Smith* v. *Cooke* [1891] A.C. 297; *Re West* [1900] 1 Ch. 84; Nathan & Marshall, No. 14; *Re Foord* [1922] 2 Ch. 519.

[23] *Re Rees* [1950] Ch. 204; *Re Pugh* [1967] 1 W.L.R. 1262; *Re Tyler* [1967] 1 W.L.R. 1269; *ante*, pp. 89, 167.

[24] [1891] A.C. 297.

was not intended to take beneficially. A number of problems remain in the ascertainment of the intention to be ascribed to the grantor.

The Law of Property Act 1925, s. 60 (3), helps in solving these problems in relation to land.[25] While before 1926 it was necessary, in a voluntary conveyance, to insert a use in favour of the grantee in order to prevent a resulting trust arising, section 60 (3) makes this no longer necessary. A voluntary conveyance of land takes effect as expressed.

But in relation to personalty, the initial presumption probably remains that a voluntary transfer to a stranger is accompanied by the inference of a resulting trust. It may be doubted if this inference accords with normal intentions, and it gives way to the slightest contrary evidence. If there would be no point in the transaction if a resulting trust were imposed, the courts are more likely than not to reject the inference of a trust. The common sense of the transaction frequently prevails, and the rules of evidence do not prevent the sense of the transaction being deduced.

"In reality the so-called presumption of a resulting trust is no more than a long stop to provide the answer when the relevant facts and circumstances fail to yield a solution."[26]

In *Vandervell* v. *I.R.C.*[27] the settlor, V., decided to found a Chair of Pharmacology at the Royal College of Surgeons with a gift of £250,000. This was to be effected by a scheme by which the money would come from dividends to be declared by a private company controlled by V., the settlor, without however his having paid income tax and surtax on the dividends. Shares in the company were transferred, on V.'s authority, to the College, and dividends of £250,000 declared on them. As part of the transaction, the College granted an option to purchase the shares for £5,000 to a trustee company, and on the payment of the dividends to the College, the company exercised the option. The trustee company was a private company, the directors and shareholders of which were friends of V., and its actual functions consisted in acting as trustee of two settlements, one being for the benefit of V.'s family, and the other being for the benefit of V.'s employees; but its objects, and its capacity to hold assets, were not restricted to these two functions. The option to purchase the shares for a minimal sum had in effect been given to

25 "In a voluntary conveyance a resulting trust for the grantor shall not be implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee."

26 *Per* Lord Upjohn in *Vandervell* v. *I.R.C.* [1967] 2 A.C. 291 at pp. 312–313; Nathan & Marshall, No. 22, affirming *Fowkes* v. *Pascoe* (1875) L.R. 10 Ch.App. 343.

27 [1967] 2 A.C. 291; Nathan & Marshall, No. 22, *ante*, p. 122.

the trustee company by V., and so, consequently, had the shares when the option was exercised. Who held the beneficial interest in the shares? There was nothing to show that the company held the shares for the benefit of V.'s family or employee settlements, so the choice lay between holding that the shares vested in the company beneficially, or that the company held on resulting trust for V. In the latter event, V. was liable to surtax on the dividends declared in favour of the College.[28] By a majority of three to two, the House of Lords held that the company did hold on resulting trust for V. The majority did not rely on any presumption of resulting trust, but found a resulting trust on the facts. The common sense of the transaction led to the conclusion that the trustee company was intended to hold on trusts, which were to be declared later. In the meanwhile the beneficial interest must vest in V. The minority, however, took the view that V.'s principal intent was to divest himself of the shares; in a tax context, it was not reasonable to suppose that he had reserved himself any interest; it was more sensible to infer a beneficial gift to the company and reliance on the good faith of its three shareholders.

Both approaches show the flexible manner in which the courts now deal with the problems of voluntary transfers to strangers; and also demonstrate that the common sense of a transaction may on occasions be elusive.

B. Presumption of Advancement

The presumption of advancement, on the other hand, is a much more significant presumption. This presumption arises if the person to whom a voluntary conveyance is made is the wife or child of the donor, or someone to whom he stands *in loco parentis*.[29] Like the presumption of resulting trust, it is rebuttable by evidence that the donor intended to keep the beneficial interest for himself, but the crucial point here is that the presumption is a fairly strong one, " should not . . . give way to slight circumstances," [30] and is protected by certain rules of evidence.

In *Shephard* v. *Cartwright*,[31] C. caused shares in companies he was promoting to be allotted to himself, his wife and his three

[28] I.T.A. 1952, s. 415 (1) (*a*), (2).
[29] For details see *post*, p. 215 *et seq.*
[30] *Per* Viscount Simonds in *Shephard* v. *Cartwright* [1955] A.C. 431 at p. 445; *cf.* Lord Upjohn in *Pettitt* v. *Pettitt* [1969] 2 W.L.R. 966 at pp. 990–991.
[31] [1955] A.C. 431. Mellish L.J.'s judgment in *Fowkes* v. *Pascoe* (1875) L.R. 10 Ch.App. 343, emphasising the sense of the transaction, was expressly approved.

children. Between 1929, when the allotments took place, and 1934, the companies made considerable profits and in the latter year a public company was formed, the original shares being bought up, and the original shareholders receiving partly new shares and partly cash by way of payment. C., in fact, controlled the whole family wealth, and the shares and money were divided between his wife and children for tax reasons. The wife and children at all times acquiesced in C.'s activities, and signed powers of attorney and powers to withdraw money at his wish. By 1936, the cash had all been withdrawn by C., and spent by him. Dividends declared on the shares allotted to the children were, however, treated as the income of the children, not the income of C. To a claim by the children against C.'s estate to recover the cash drawn by him from their bank accounts, it was argued that C.'s conduct showed that he had not intended the beneficial interest to vest in the children, but that they at all times held on resulting trust for C. himself. The House of Lords rejected this contention. The onus of rebutting the presumption of advancement lay on C.'s executors, and there was nothing in C.'s conduct that was truly inconsistent with the presumption. The children had acquiesced in their father's conduct, rather than acted as trustees for him.[32] The House of Lords also affirmed the view that the rules of evidence apply in this type of case so as to make declarations and conduct subsequent to the original transaction admissible only against the party making them, though those made at the time of the original transaction are admissible for or against him.

5. Purchase in the Name of Another and the Presumption of Advancement

A. Presumption in Favour of the Purchaser

Where a purchaser of realty or personalty takes a conveyance in the name of a third party, but there is nothing to indicate an intention on his part of not appropriating to himself the beneficial interest, then there is a presumption that he intended to obtain the beneficial interest for himself, and a resulting trust will be decreed in his favour. In the words of Eyre C.B.: "The trust of a legal estate . . . results to the man who advances the purchase-money."[33]

[32] This conduct is reminiscent of the "reverence and good manners" that, according to Lord Nottingham, explains how a son permits a father to interfere with property advanced to him: *Lord Grey* v. *Lady Grey* (1677) 2 Swan. 594 at p. 600.

[33] *Dyer* v. *Dyer* (1788) 2 Cox 92 at p. 93.

The presumption arises when a purchase is made in the joint names of a purchaser and a stranger, and where a purchase is made in the name of a stranger alone; and also where property purchased with the contributions of more than one person is conveyed into the name of only one of them.

The classic case is *Fowkes* v. *Pascoe*.[34]

> Mrs. B. purchased stock in the names of herself and the son of her widowed daughter-in-law. The son was technically a stranger, hence he would prima facie be presumed to hold on resulting trust for Mrs. B. But the Court of Appeal in Chancery held that the strength of the presumption varied according to the circumstances and that, once there is some evidence to rebut it, the court must look at the facts from a common-sense point of view. In the present case, the only rational inference was that Mrs. B. intended the purchase as a gift, so that the presumption of resulting trust was rebutted, though the effect of the gift would not be apparent until Mrs. B.'s death, for the court also held that any income declared on the stock during Mrs. B.'s lifetime would belong beneficially to her. Such a gift does not infringe the Wills Act 1837, as the legal title passes by the transfer; the legal title carries with it the *ius accrescendi*, and all that happens on the death of Mrs. B. is that her equitable right ceases to be outstanding.[35] There is thus no *testamentary* gift provided the transfer *inter vivos* is complete and not revocable.[36]

B. Presumption of Advancement

As in the case of voluntary conveyances, a purchase in the name of a wife or child or other person to whom the purchaser stands *in loco parentis* raises a contrary presumption, as the purchase is presumed in these cases to be an advancement. And, as we saw, this presumption is of some strength. It may however be rebutted. In *Warren* v. *Gurney*[37]:

> A father bought a house for his daughter, who was shortly to get married, to live in. The conveyance was taken in the name

[34] (1875) L.R. 10 Ch.App. 343; see also *Pettitt* v. *Pettitt* [1969] 2 W.L.R. 966.

[35] *Young* v. *Sealey* [1949] Ch. 278. The argument is not an easy one, but Romer J. preferred to take this view as no previous English case had taken this point under the Wills Act, and gifts of this sort had not previously been thought to raise difficulties. He also had the authority of the Supreme Court of Ontario in *Re Reid* (1921) 50 Ont.L.R. 595.

[36] But in the case of a joint bank account opened by a husband in the name of himself and his wife so that either can draw on it (the account being kept in credit by the husband), there is a gift to the wife of what happens to be in the account at the date of the husband's death. The difficulties of this reasoning are discussed by Megarry J. in *Re Figgis* [1969] Ch. 123, where however *Young* v. *Sealey*, *supra*, was followed.

[37] [1944] 2 All E.R. 472; see also *Pettitt* v. *Pettitt* [1969] 2 W.L.R. 966.

of the daughter, but the father retained the title deeds. On his death 15 years later, the daughter claimed to be the beneficial owner of the house. The Court of Appeal held that there was a presumption of advancement in her favour, but that it had been rebutted by the fact of the retention of the title deeds, accompanied by evidence contemporaneous with the purchase in 1929. Retention of the deeds by itself is probably insufficient evidence, however. The court also rejected as inadmissible a document prepared by the father in 1943.

C. Purchase by Several in the Name of One

Cases in which a conveyance is taken in the name of only one of several purchasers deserve special mention. The general principle is that the legal title is held on trust for the purchasers in the proportions in which they contributed to the purchase price.[38] The purchasers thus have more than a charge on the property for the amount of their contributions. They have a concurrent interest and can claim the due proportion of the proceeds on any eventual sale of the property, to include a proportion of any increase in the value of the property.[39] The same principle may apply if what one of the "purchasers" supplies is not cash, but work, provided it is work of a kind or extent that is not usual in the circumstances.[40] These cases give rise to considerable practical difficulties in relation to land. Since the true facts of the purchase can be proved by oral evidence,[41] and such evidence is no part of the title available for investigation, a purchaser has no obvious means of discovering that the land in question may be held on statutory trusts.[42]

Many of these cases involve husband and wife. If the legal title is placed in the wife alone, the presumption of advancement arises, but the presumption is not strong, at least in the case of the purchase of a matrimonial home, or other "family" assets.[43] But often the courts prefer to conclude that the husband and wife own in equity in equal proportions.[44] Thus if the legal title to property is placed in the husband alone, but the wife has contributed a proportion of the purchase money, the courts prefer to say that the equitable ownership is on an equal footing though the wife's contribution was

38 *Wray* v. *Steele* (1814) 2 V. & B. 388.
39 *Diwell* v. *Farnes* [1959] 1 W.L.R. 624. "Purchaser" includes a person who pays mortgage instalments, as this is just a form of purchasing by deferred payments.
40 In *Pettitt* v. *Pettitt*, *supra*, the House of Lords was divided on the need for an express agreement before the principle could apply.
41 *Heard* v. *Pilley* (1869) L.R. 4 Ch.App. 548.
42 *Cook* v. *Cook* [1962] P. 235; *post*, pp. 511, 528.
43 *Silver* v. *Silver* [1958] 1 W.L.R. 259. *Pettitt* v. *Pettitt*, *supra*, at p. 991. See generally (1966) 30 Conv.(N.S.) 354 (H. K. Bevan and F. W. Taylor).
44 *Gissing* v. *Gissing* [1969] 2 W.L.R. 525; *Nixon* v. *Nixon*, *The Times*, July 11, 1969.

markedly less than half.[45] Evidence will of course be received to show that an equal division is not intended, and this is so even if the conveyance expressly declares the husband and wife to be joint tenants.[46]

6. When does the Presumption of Advancement Occur?

The theory behind the presumption is that it exists in cases where the donor or purchaser is under an obligation, recognised in equity, to support or provide for the person advanced.

A. Husband and Wife

The presumption exists when a husband puts property into the name of his wife. The presumption is of some strength, save in the cases of family assets, but does not of course govern if the transaction was really for the purpose of making it easier for the wife to draw money from an account, the husband being ill.[47] It also applies where the gift is made before marriage, but with a specific marriage (which in fact takes place) in mind.[48] It does not apply however, to every case in which a husband indulges his wife. For instance in *Anson* v. *Anson*,[49] a husband guaranteed his wife's banking account and eventually had to pay a sum of money to the bank as a result. Pearson J. held that the husband could recover this sum from the wife, as the transaction was not in the nature of an advancement. Also, a joint account, opened for the general use of both husband and wife, will frequently lead to the inference of a *joint* tenancy at law and equity.[50] But there is no presumption of advancement when a man puts property into the name of his mistress,[51] nor is there a

[45] *Ulrich* v. *Ulrich* [1968] 1 W.L.R. 180 (a house purchased just before marriage). But the wife must have contributed something, and at this stage: *Allen* v. *Allen* [1961] 1 W.L.R. 1186; *Gissing* v. *Gissing*, *supra*.

[46] *Bedson* v. *Bedson* [1965] 2 Q.B. 666. This case also shows that the courts have a discretion in the manner in which they enforce these rights, under the Married Women's Property Act 1882; but the rights cannot be denied or varied under these provisions; *Pettitt* v. *Pettitt*, *supra*.

[47] *Marshal* v. *Crutwell* (1875) L.R. 20 Eq. 328. The problem of housekeeping money was dealt with by the Married Women's Property Act 1964, under which equality of ownership is presumed in the absence of other evidence; *cf. Re Figgis* [1969] Ch. 123.

[48] *Moate* v. *Moate* [1948] 2 All E.R. 486; *Ulrich* v. *Ulrich* [1968] 1 W.L.R. 180. In this connection, there is a vital distinction between a wholly void ceremony of marriage and a marriage which is subsequently declared to be void: *Dunbar* v. *Dunbar* [1909] 2 Ch. 639. The latter occurrence does not affect the operation of the presumption.

[49] [1953] 1 Q.B. 636.

[50] *Re Bishop* [1965] Ch. 450; *Re Figgis* [1969] Ch. 123. *Cf.* note 36, *ante*, p. 213.

[51] *Diwell* v. *Farnes* [1959] 1 W.L.R. 624. The presumption of resulting trust in such a case may not however be strong.

presumption when a wife puts property into the name of her husband.[52]

B. Father and Child

There is a presumption of advancement between a father and his legitimate child. This, again, is a strong presumption.

In *Re Roberts*,[53] a father took out an insurance policy on the life of his son and paid the premiums on it. The father was expressed to be a trustee of the policy, and it was contended after his death that the amounts paid by way of premium were recoverable by his estate. Evershed J. held that the presumption of advancement prevailed over the other evidence, and that each premium paid by the father during his lifetime was a separate advancement to the son. The use of the word " trustee " was indicative less of a contrary intent than a means of enforcement against the insurers.

C. Other Relationships

But the moment one passes from this type of case to gifts from a mother to a child (whether or not the father is dead), from a father to an illegitimate child, from grandparents, aunts and uncles, then the presumptions fade. Whether or not the presumption is technically in favour of a resulting trust, or technically in favour of advancement, the important consideration is whether or not there is evidence that the donor or purchaser regarded himself or herself as being *in loco parentis*, and the donee as being someone for whom an obligation to provide is felt.[54] The issue is treated as one of fact in the modern cases, and it is only in the absence of any evidence that the technical presumptions prevail.[55] Although, therefore, in cases other than that of father and legitimate child, the presumption may technically be in favour of a resulting trust, this is not for the vast majority of cases a decisive factor. The point is well brought out by the cases dealing with widowed mothers and their children.[56] In this situation, equity

52 *Mercier* v. *Mercier* [1903] 2 Ch. 98. These rules are probably unaffected by recent statutes recognising obligations in this and analogous circumstances, but, as is suggested *infra*, this is not as important a point as it at first sight seems.

53 [1946] Ch. 1. A case where the presumption was rebutted is *Re Gooch* (1890) 62 L.T. 384.

54 See *per* Page-Wood V.-C. in *Tucker* v. *Burrow* (1865) 2 H. & M. 515 at pp. 525–527. A modern illustration is to be found in *Re Paradise Motor Co. Ltd.* [1968] 1 W.L.R. 1125.

55 An example of no evidence is *Re Vinogradoff* [1935] W.N. 68; Nathan & Marshall, No. 19.

56 *Bennet* v. *Bennet* (1879) 10 Ch.D. 474, discussing *Sayre* v. *Hughes* (1868) L.R. 5 Eq. 376.

does not recognise in the mother, as it would have done in the father, an obligation to provide, hence there is no presumption of advancement. But the strangeness of this conclusion is wholly mitigated by the ease with which, on very little evidence, the courts will find the intent to advance.[57]

7. Cases with an Element of Unlawfulness

This section is not concerned with those resulting trusts that are imposed through a failure to comply with requirements such as writing or the rule against perpetuities, nor with cases such as *Thrupp* v. *Collett* [58] in which a testator's purported trust is illegal; but with cases in which an illegality is part of the evidence on which a resulting trust will or will not be found to exist. This situation is illustrated by *Re Emery's Investment Trusts.*[59]

> American bonds, bought by the husband, were placed in the name of the wife (an American citizen) to evade an American tax, though the intention was, as Wynn-Parry J. found, that the husband and wife should own them in equal proportions in equity. But technically there was a presumption of advancement, which the husband had to rebut. It was held that he could do so only with the aid of proof of the intent to evade tax, and this intent he would not be allowed to prove. The wife could thus retain the whole, despite the fact that she was a party to the scheme.

Equity will refuse its aid to a plaintiff who has to rely on an illegality in this way.[60] The same is true of assignments in fraud of creditors, though a plaintiff may not in this type of case be refused equity's aid if the transaction deceived nobody and nothing had been done under it.[61]

[57] See especially Jessel M.R. in *Bennet* v. *Bennet*, *supra*.
[58] (1858) 26 Beav. 125 (trust to pay the fines of poachers); *post*, p. 237.
[59] [1959] Ch. 410; *Gascoigne* v. *Gascoigne* [1918] 1 K.B. 223; *Chettiar* v. *Chettiar* [1962] A.C. 294.
[60] See the general statements to this affect in *Ayerst* v. *Jenkins* (1873) L.R. 16 Eq. 275 *per* Lord Selborne L.C.
[61] *Gascoigne* v. *Gascoigne* [1918] 1 K.B. 223; *Symes* v. *Hughes* (1870) L.R. 9 Eq. 475.

CHAPTER 13

CONSTRUCTIVE TRUSTS

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1. GENERAL

A CONSTRUCTIVE trust is one which arises by operation of law, and not by reason of the intention of the parties, express or implied. The principle is that where a person who holds property in circumstances in which in equity and good conscience it should be held or enjoyed by another, he will be compelled to hold the property on trust for that other.[1] Such a general statement is of little help, however, in determining whether or not a constructive trust exists. Equity has proceeded pragmatically in this field; an account of constructive trusts can do no more than record a number of separate situations in which they have been held to exist. A few points of general application may, however, be made.

A. Overlap in Classification

We saw, in discussing the classification of trusts,[2] that there is an overlap also between implied, resulting and constructive trusts. If

[1] See *Beatty* v. *Guggenheim Exploration Co.*, 225 N.Y. 380 at p. 386 (1919); *Soar* v. *Ashwell* [1893] 2 Q.B. 390; (1913–14) 27 Harv.L.R. 125 (A. W. Scott); (1955) 71 L.Q.R. 39 (A. W. Scott); *Restatement of Restitution*, § 160.

[2] *Ante*, p. 101.

a settlor conveys property to trustees to hold upon certain trusts which fail, we can say that the beneficial interest returns to the settlor, because that was the implied intention, or because it is a case of a resulting trust, or that it is right and just that it should do so.[3] Usually it makes no difference which theory is applied.

The constructive trust is usually regarded as a residual category; one which is called into play where the court desires to impose a trust and no other suitable category is available.

B. Establishing the Existence or the Terms of the Trust

The imposition of a constructive trust is usually a determination that previously declared trusts are enforceable against someone other than the original trustee.[4] Thus, a purchaser, not being a bona fide purchaser of the legal estate for value without notice from a trustee, holds the property subject to the existing trusts. And a trustee who makes an improper profit holds the profit on the trusts which had previously been declared of the property out of which the profit was made.[5]

It may be, however, that the constructive trust will determine the trusts on which a person, admittedly a trustee, will hold the property. Thus, in a case of mutual wills, the executor of the second party to die needs to know whether he holds on the trusts of the testator's will, or under the agreement which was the basis of the mutual wills.[6]

Or it may be that a constructive trust determines both these questions. A person who fraudulently persuades a testator to leave a legacy to him by giving an undertaking to hold it on trust for a third party will be compelled by equity to hold the legacy on trust, and on trust for the third party even though the trust was never properly declared according to the provisions of the Wills Act 1837.[7]

These are, it is submitted, all cases of constructive trusts, for they are situations in which either the existence of the trusteeship or the terms of the trust or both are determined by operation of law and not by act of the parties.

C. The Duties of a Constructive Trustee

The duties and liabilities of a constructive trustee are not necessarily the same as those of an express trustee. This matter will be considered in more detail in Chapter 22. The point here is that a decision that X holds as constructive trustee does not necessarily

[3] *Ante*, p. 101.
[4] Bowen L.J. in *Soar* v. *Ashwell* [1893] 2 Q.B. 390 at p. 396.
[5] *Post*, p. 223.
[6] *Post*, p. 228.
[7] *Ante*, p. 155 *et seq.*

subject him to the usual trustees' duties in respect of investments, etc.[8] If a person purchases land with constructive but not actual notice of a trust, he will take as constructive trustee; the beneficiaries may enforce the trust against him; but if he is not informed of their claims for some years, he will not be subjected also to liability for failure to invest in trustee investments and to the usual standard of *exacta diligentia* which is required of express trustees in the performance of their duties.[9] The duties of a constructive trustee have not been made clear; they probably vary with the circumstances and will be greater for a fraudulent trustee than for the innocent purchaser in the situation just discussed.[10] It may be that the innocent constructive trustee is under no greater duty than to return to those beneficially entitled such part of the property as he has retained.[11]

D. Constructive Trust is Dependent upon Specific Property being Vested in the Defendant

Circumstances giving rise to a constructive trust may give rise to other remedies also. A person can only be a trustee if there is vested in him certain property which he holds upon trust. A constructive trust therefore can only exist where the property in question is vested in the trustees; as, for example, where a trustee of a lease obtains a benefit for himself by negotiating a renewal of the lease in his own favour; the new lease is vested in him and is held on constructive trust for the beneficiary.[12] This type of situation is the subject-matter of the present chapter.

There are two other remedies which may also exist in the same situation (and also in others). These are the equitable proprietary remedy of tracing, and a personal action in equity for compensation. They should be borne in mind when considering constructive trusts; but they must be distinguished from them. They are considered in more detail below.[13]

It has been seen that a trustee who obtains a benefit for himself in breach of trust may be compelled to hold on constructive trust the specific property which he wrongly obtained. If, however, that property is no longer vested in him, he can no longer be trustee of it. The best that can be done in such a situation is to allow the plaintiff

[8] *Post*, p. 313 *et seq.*

[9] *Post*, p. 293.

[10] *Post*, p. 426; *Restatement of Restitution*, §§ 202–204.

[11] In *Re Diplock* [1948] Ch. 465 the innocent recipient of trust money who mixed it with his own was held to have an equal claim with the beneficiaries to the mixed fund. The personal claim was under a different head. *Post*, p. 475.

[12] *Keech* v. *Sandford* (1726) Sel.Cas.t.King 61; Nathan & Marshall, No. 77; *post*, p. 223.

[13] *Post*, p. 369 *et seq.*

to sue for its value. If the trustee in the previous example of the constructive trust of the lease had conveyed the lease to a bona fide purchaser for value without notice,[14] and disposed of the proceeds of sale, there could be no constructive trust because there is no property vested in the defendant which can be the subject of the trust. The defendant has done wrong, and the plaintiff may sue him. But this is only a personal action. The defendant is *accountable*; he is not a constructive trustee. And if, at the time of the suit, he has insufficient assets, the plaintiff will be unable to obtain compensation in full.

There is, however, an intermediate step. It may be possible to show that the property, wrongly obtained and disposed of, is now represented by some other property in the trustee's (defendant's) hands; and, by use of the equitable proprietary remedy, to "follow" the original property into that for which it has been exchanged. Direct exchange is of course unlikely; usually the property is sold, and money received in exchange. This immediately raises the question how to identify the money in the defendant's assets. This is done by the technique of "tracing"[15]; in short, the money will be treated as that money in the defendant's assets if the plaintiff can show that the defendant's bank account was, since the receipt, always in credit to the amount of the sum in question. The defendant is treated as spending his own money first. If the lowest intermediate balance in his account has never been reduced below the amount of the trust money, that money is treated as having always remained in the account.

The advantages of "tracing" the money in this way are twofold. First, if the defendant should become insolvent, the plaintiff takes in priority to the general creditors, for the money "traced" is trust money, and is kept out of the defendant's insolvency.[16] Secondly, if the money has been invested successfully by the defendant, the plaintiff is allowed to claim the share of the investments which is proportionate to the share which the trust money contributed to the invested fund.[17]

There are thus three separate matters to consider: constructive trusts, proprietary remedies, and personal actions. They are all interrelated, but each is distinct. Many statements of the law and many decisions fail to make these distinctions, and fail to make clear whether the issue is one of accountability or one of trust.[18] An

[14] Who would therefore take free from the trust.
[15] *Post*, p. 418.
[16] *Re Hallett's Estate* (1880) 13 Ch.D. 696; Nathan & Marshall, No. 80.
[17] *Re Tilley's W.T.* [1967] Ch. 1179.
[18] *Reading* v. *Att.-Gen.* [1951] A.C. 507; *Boardman* v. *Phipps* [1967] 2 A.C. 46; Nathan & Marshall, No. 78; *Selangor United Rubber Estates Ltd.* v. *Cradock* (*No.* 3) [1968] 1 W.L.R. 1555; *cf. Lister* v. *Stubbs* (1890) 45 Ch.D. 1, *post*, p. 424.

attempt in this chapter will be made to limit the discussion of constructive trusts to cases which are properly concerned with trusts. Accountability and the question of liability to proprietary remedies are considered later.[19]

E. Substantive Trust or Remedy: The American View

We saw that the duties of a constructive trustee bear little relation to those of an ordinary trustee. If the plaintiff merely wishes to have the property returned, the question is whether a constructive trust need be considered as anything beyond a means of demanding the return of the property to which he is entitled in equity, and which is wrongly held by another. This is the way in which constructive trusts are regarded in most jurisdictions in the U.S.A. and in the *Restatement*. "Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises."[20] Thus the duty is to convey to those entitled; not to hold on trust for them.

The constructive trust is regarded as a "remedial rather than substantive" institution.[21] It becomes one of the equitable proprietary remedies, and the substantive constructive trust of the kind found in *Keech* v. *Sandford*[22] disappears. The extent of liability of the defendant will depend on whether or not he was innocent or fraudulent, and a number of elaborate rules are established.[23]

The proprietary remedy of a constructive trust is available under this doctrine, whenever it is needed to prevent unjust enrichment. It is the proprietary remedy in circumstances in which an action in quasi-contract is the personal remedy. "A constructive trust differs from an express trust in much the same way as a quasi-contractual obligation differs from a contractual obligation"[24]; and, like other equitable remedies, is available where the legal remedy is inadequate. Thus, in a case of unjust enrichment the plaintiff will sue in quasi-contract for recovery; but if the defendant still has the property, and either the plaintiff wants specific recovery, or the defendant is insolvent, or the property has increased in value while the defendant held it, the plaintiff will be able to rely on the proprietary remedy of a constructive trust.

19 *Post*, p. 369 *et seq.*
20 *Restatement of Restitution*, § 160; (1955) 71 L.Q.R. 71 (A. W. Scott); *ante*, p. 102; *Carl Zeiss Stiftung* v. *Herbert Smith and Co.* [1969] 2 W.L.R. 427 at pp. 443–444.
21 (1920) 33 Harv.L.R. 420 (R. Pound).
22 (1726) Sel.Cas.t.King 61; Nathan & Marshall, No. 77; *post*, p. 223.
23 *Post*, p. 425; (1959) 75 L.Q.R. 234 (R. H. Maudsley).
24 *Restatement of Restitution*, § 160, Comment (*a*).

This concept has much to recommend it, but it would, however, be misleading to suggest that it represents existing English law.

2. When a Constructive Trust Arises

A. Unauthorised Profit by a Trustee or Fiduciary

i. Renewing a Lease. In the leading case of *Keech* v. *Sandford*,[25] the defendant held a lease of the profits of a market on trust for an infant. Before the expiration of the lease, the defendant asked the lessor to renew the lease for the benefit of the infant. The lessor refused to do so on the ground that, as the lease was of the profits of the market, he would be unable to distrain, and would be unable to enforce the covenant against the infant. The trustee then took a lease for his own benefit. Lord Chancellor King held that he must hold the lease on trust for the infant.

The extent of the rule is not easy to establish. It is said to apply not only to trustees,[26] but also to fiduciaries.[27] There is no clear rule as to the relationships covered, but there are many cases which hold that company directors,[28] agents,[29] partners[30] and tenants for life[31] are accountable for profits made.[32] Persons outside such relationships may also be liable if they have made use of their position to obtain a benefit for themselves; otherwise not.

In *Re Biss*,[33] a lessor had refused to renew a seven-year lease of premises, and the lessee remained in possession as tenant from year to year. He died, leaving a widow and three children of

[25] (1726) Sel.Cas.t.King 61; *Re Knowles' W.T.* [1948] 1 All E.R. 866; *Protheroe* v. *Protheroe* [1968] 1 W.L.R. 519; (1969) 33 Conv.(N.S.) 161 (S. M. Cretney), discussing the historical reasons for the rule.

[26] *Williams* v. *Barton* [1927] 2 Ch. 9; *Re Macadam* [1946] Ch. 73; *cf. Re Dover Coalfield Extension Ltd.* [1908] 1 Ch. 65; *Re Sykes* [1909] 2 Ch. 241; *Re Gee* [1948] Ch. 284; *Re Northcote's W.T.* [1949] 1 All E.R. 442; *Re Llewellin's W.T.* [1949] Ch. 225; *Re Waterman's W.T.* [1952] 2 All E.R. 1054; *Re Jarvis* [1958] 2 All E.R. 336; Tiley, p. 154.

[27] See Waters, *The Constructive Trust*, Chap. IV.

[28] *Selangor United Rubber Estates Ltd.* v. *Cradock* (*No.* 3) [1968] 1 W.L.R. 1555.

[29] *De Bussche* v. *Alt* (1878) 8 Ch.D. 286 at p. 310; *Lister* v. *Stubbs* (1890) 45 Ch.D. 1; *Boardman* v. *Phipps* [1967] 2 A.C. 67; Nathan & Marshall, No. 78, and see the cases on the taking of bribes by an agent; Hanbury, *Principles of Agency* (2nd ed.), p. 67.

[30] *Featherstonhaugh* v. *Fenwick* (1810) 17 Ves.Jr. 298; *Clegg* v. *Fishwick* (1849) 1 Mac. & G. 294; *Clegg* v. *Edmondson* (1857) 8 De G.M. & G. 787.

[31] *Taster* v. *Marriott* (1768) Amb. 668; *Rawe* v. *Chichester* (1773) Amb. 715; *Pickering* v. *Vowles* (1783) 1 Bro.C.C. 197. But a tenant for life is not accountable in respect of tax reliefs for improvements effected under S.L.A. 1925, s. 72 (1) (iv), whose cost has been repaid to him under s. 75 (2); *Re Pelly's W.T.* [1957] Ch. 1.

[32] Presumably joint tenants and tenants in common should be added because of the trust for sale introduced by L.P.A. 1925, ss. 34–36. Previously, there was no fiduciary relationship; *Kennedy* v. *De Trafford* [1897] A.C. 180 (tenants in common); *Re Biss* [1903] 2 Ch. 40 (joint tenants).

[33] [1903] 2 Ch. 40.

whom one was an infant. The widow (his administratrix) and the two adult children continued as yearly tenants. The lessor then terminated that tenancy, and granted a three-year lease to one of the adult children. The Court of Appeal allowed him to keep the lease for his own benefit. Romer L.J. said that[34] "where the person renewing the lease does not clearly occupy a fiduciary position" he "is only held to be a constructive trustee of the renewed lease if, in respect of the old lease, he occupied some special position and owed, by virtue of that position, a duty towards the other persons interested." If such a person, by virtue of his position "is enabled to obtain a renewal of the lease, equity clearly demands that the new right obtained in virtue of the old, should be regarded as a graft on the old. . . ."

ii. Purchase of the Reversion. Where the trustee acquires the freehold reversion, the position is unclear. The trustee is accountable if he has in any way made use of his position to get a personal benefit: thus if the lessor makes an offer to all his lessees giving them the right of enfranchisement on favourable terms, or if the lessee had any statutory right of enfranchisement, there could be no doubt that the trustee who sought to take the reversion for his own benefit would be accountable. The courts have, however, vacillated in deciding whether there is any *absolute* liability in the absence of such abuse[35]: in *Protheroe* v. *Protheroe*[36] the Court of Appeal, without referring to the relevant authorities, held that the rule was applicable, without qualification, to purchases of the freehold, but the facts in that case indicate[37] that the purchaser had got special terms because he was already in possession. In earlier cases the courts had limited the rule to cases where the lease, the reversion on which was being purchased, was renewable by law or custom.[38] The rationale of that limitation was that if the lease were normally renewed in practice,[39] the lessee would suffer if the lease passed to a third party who might not follow the custom (particularly if the lease, as was commonly the case with church leases, was generally renewed at less than the market rent). Thus it was wrong to allow the trustee, who ought to be protecting his beneficiary's interests, to damage them. Today, by statute, many lessees are given valuable rights of renewal

34 *Ibid.* at p. 61.
35 *Norris* v. *Le Neve* (1743) 3 Atk. 26; *Randall* v. *Russell* (1817) 3 Mer. 190; *Hardman* v. *Johnson* (1815) 3 Mer. 347; *cf. Phillips* v. *Phillips* (1885) 29 Ch.D. 673.
36 [1968] 1 W.L.R. 519; (1968) 31 M.L.R. 707 (P. Jackson).
37 (1968) 84 L.Q.R. 309 (Lindsay Megarry).
38 *Longton* v. *Wilsby* (1897) 76 L.T. 770; *Bevan* v. *Webb* [1905] 1 Ch. 620; *cf. Griffith* v. *Owen* [1907] 1 Ch. 195.
39 See generally (1969) 33 Conv.(N.S.) 161 (S. M. Cretney), where the history of the doctrine is traced.

or enfranchisement. It is submitted that the proper question in each case is: has the trustee taken advantage of his position to get a personal benefit? If so, he is accountable, otherwise he is not. But it must be emphasised that the onus would be on the trustee to satisfy the court, and it would be a very difficult one to discharge.

iii. Accountability. There are many other cases which raise the question of the liability of a fiduciary to account for profits made in breach of his fiduciary duty, and these cases are often discussed under the heading of constructive trusts. They are concerned, however, with liability or accountability rather than with trusts. This is so even though the courts have sometimes found a trust, and though the property in question was sometimes vested in the defendant. In none of them, however, did the question arise whether the defendant was a trustee *as opposed* to being accountable. They are considered under the heading of liability of fiduciaries.[40]

B. Liability of Strangers to the Trust

Persons, not appointed trustees, may be liable as if they were so appointed, if they intermeddle with the trust funds or with the administration of the trust. Intermeddling can take an unlimited number of different forms; but for the purposes of liability, there appear to be two distinct categories.[41]

i. Trustees de son Tort. Where the defendants " take on themselves to act as [trustees] and to possess and administer trust property for the beneficiaries . . .," [42] and claim to act not for themselves, but for the beneficiaries, they commit no wrong by doing so. The complaint against them is that they, having undertaken to administer the trust, are burdened with the duties of a trustee, and are liable, as ordinary trustees would be, for breaches of trust committed in the administration of a trust.

Such a person is a *trustee de son tort*.[43] To be a trustee, the property must of course be vested in him [44]; and he will only be subjected to a trustee's liability if he receives the property into his hands in connection with his assumption of the trustee's office and duties. In *Williams-Ashman* v. *Price and Williams*,[45] Bennett J.

[40] *Post*, p. 372. The distinction is clearly shown in *Lister* v. *Stubbs* (1890) 45 Ch.D. 1, *ante*, p. 221; *post*, p. 424; (1959) 75 L.Q.R. 234 (R. H. Maudsley).
[41] Based on Ungoed-Thomas J.'s categorisation in *Selangor United Rubber Estates* v. *Cradock* (*No.* 3) [1968] 1 W.L.R. 1555.
[42] *Ibid.* at p. 1579 *et seq.*
[43] An expression borrowed, according to Kekewich J. in *Re Barney* [1892] 2 Ch. 265, from the law of executors and corresponding to an executor *de son tort*; *post*, p. 441.
[44] *Re Barney* [1892] 2 Ch. 265 at p. 272.
[45] [1942] Ch. 219 at p. 228.

treated *Mara* v. *Browne* [46] as authority for the proposition that "an agent in possession of money which he knows to be trust money, so long as he acts honestly, is not accountable to the beneficiaries interested in the trust money unless he intermeddles in the trust by doing acts characteristic of a trustee and outside the duties of an agent." Thus a solicitor acting as such to a trust, through whose accounts trust money passed for investment on mortgage, was not held liable as a *trustee de son tort*.[47] Nor would a stockbroker be liable for receiving trust money and investing it on the trustee's instructions in an unauthorised investment. Nor is a solicitor liable to account for moneys received in payment of costs and expenses paid by a client for work done in defending an action in which the plaintiff was attempting to establish that the client was constructive trustee of the whole of its assets.[48]

The liability imposed upon a *trustee de son tort* is in accordance with the principle that any person who receives into his hands trust moneys, not being a purchaser for value without notice, becomes trustee of them.[49] Normally, in these cases, the defendant is aware of the trust; indeed, he is usually trying to administer it. But liability can also arise where he does not know, but ought to know; for example, where a trust was being administered by a solicitor who was not a trustee, and trust moneys were paid into the account of the solicitor's firm and misapplied, all the partners were jointly and severably liable, although the others did not actually know of the transaction.[50] The knowledge of the one partner "must . . . be imputed to the other partners." [51]

The question then arises whether a *trustee de son tort* is a constructive trustee. Various views have been expressed on the matter.[52] Prior to 1939 constructive trustees were protected by the Statutes of Limitation, but express trustees were not,[53] and in *Soar* v. *Ashwell*,[54] the Court of Appeal held that a solicitor who received trust money and misapplied it was an express trustee and not protected by lapse

[46] [1896] 1 Ch. 199.

[47] *Mara* v. *Browne* [1896] 1 Ch. 199; *Williams-Ashman* v. *Price and Williams* [1942] Ch. 219.

[48] *Carl Zeiss Stiftung* v. *Herbert Smith & Co.* (*No.* 2) [1969] 2 W.L.R. 427; (1969) 85 L.Q.R. 160 (P.V.B.).

[49] *Lee* v. *Sankey* (1873) L.R. 15 Eq. 204, p. 211; *Nelson* v. *Larholt* [1948] 1 K.B. 339.

[50] *Blyth* v. *Fladgate* [1891] 1 Ch. 337; see Partnership Act 1890, s. 13.

[51] *Ibid.* at p. 352.

[52] A. L. Smith L.J. in *Mara* v. *Browne* [1896] 1 Ch. 199 at p. 209; *Soar* v. *Ashwell* [1893] 2 Q.B. 390; Nathan & Marshall, No. 16, and see pp. 310, 311; Pettit, pp. 99–100.

[53] *Per* Lord Esher in *Soar* v. *Ashwell*, *supra*, at pp. 390–393.

[54] [1893] 2 Q.B. 390.

of time.[55] It is difficult however to see how a person who was not appointed trustee could be an express trustee. Further, the application of the strict rules concerning express trustees would be very harsh in the case of an innocent intermeddler who was guilty only of a technical breach of trust, or of one who was not subjectively aware of the trust. To hold him to be a constructive trustee makes it possible for the extent of his liability to depend upon the circumstances of the case.[56] Most statements treat a *trustee de son tort* as one type of constructive trustee; and it is submitted that this is right.

ii. Liability of Agents and Fiduciaries. An agent may be liable to make good the loss to a trust without the trust property being vested in him and without his purporting to act as trustee; as where an agent fraudulently participates with a trustee in a breach of trust. He is there acting for himself and not for the beneficiaries and the liability arises by reason of the act, and not by reason of any knowledge which he had previously assumed.[57]

Ungoed-Thomas J. said in *Selangor United Rubber Estates* v. *Cradock*[58] that such a person is not a *trustee de son tort*; and it is submitted that, as no trust property is vested in him he should not be called a constructive, or any other kind of trustee. The question at issue however is only one of personal liability; and the matter is thus merely one of terminology. It makes no practical difference whether we speak of the personal liability as a constructive trustee, or of the liability of a fiduciary to account. It may be said however that, as there is no trusteeship, the matter should not be considered in this chapter, but hereafter; that is so; but because the cases are closely allied with those of trusteeship *de son tort*, it will be convenient to discuss the question here.

In *Barnes* v. *Addy*,[59] Lord Selborne laid down the test of liability as that of "actually participating in any fraudulent conduct of the trustee to the injury of the *cestui que trust*" and as assisting "with knowledge in a dishonest and fraudulent design on the part of the trustees."

In that case trust funds were misapplied by a sole trustee. The defendant, a solicitor, had advised against the appointment of the sole trustee, and of the transfer of the funds to him; but he prepared the necessary documents. He was held not liable.

[55] Under Limitation Act 1939 time may now run in favour of an express trustee; *post*, p. 410.
[56] *Re Diplock* [1948] Ch. 465; *post*, p. 418 *et seq.*
[57] *Selangor United Rubber Estates* v. *Cradock* [1968] 1 W.L.R. 1555.
[58] *Ibid.* at p. 1579.
[59] (1874) L.R. 9 Ch.App. 244 at pp. 251, 252; Nathan & Marshall, No. 79.

In *Soar* v. *Ashwell*,[60] Lord Esher M.R. put the test in similar words. ". . . a person not nominated a trustee may be bound to liability as if he were a nominated trustee, namely, where he has knowingly assisted a nominated trustee in a fraudulent and dishonest disposition of the trust property."

These statements leave open the question whether it is essential that the defendant subjectively knew of the dishonest design, or whether it is sufficient that he ought to have known.

In *Selangor United Rubber Estates* v. *Cradock*,[61] a number of questions arose relating to the liability of several defendants who had been involved in transactions whose basic object was the use of the company's money for the purchase of its own shares. This was an improper and dishonest application of the company's assets.[62] The company, in liquidation, sought to impose equitable liability upon the defendants. The first defendant, who was the leading spirit in these operations, was bankrupt.

Some of the defendants (*e.g.*, the directors of the plaintiff company, who paid away the money and acted throughout under Cradock's instructions; the District Bank who, on the instructions of their customer Cradock, co-operated in providing the finance) were unaware of the nature of the transactions. Others (Contanglo Ltd. who acted for Cradock throughout, and Woodstock Trust Ltd. which received the plaintiff company's money as a loan and lent the same sum to Cradock at a higher rate of interest) did know.

Ungoed-Thomas J. held them all liable. It was sufficient, in the case of the directors, that they acted on the directions of Cradock who of course knew all the facts; and in the case of the District Bank that they should have known that the payments were a dishonest application of the company's funds.

C. Mutual Wills

i. The Doctrine. Two persons (usually husband and wife, but not always)[63] may agree that, on the death of the first to die, all their property shall be enjoyed by the survivor; and after his (her) death by nominated beneficiaries; and may make mutual wills to that effect. The question is whether, and to what extent, such an agreement is binding.

60 [1893] 2 Q.B. 390 at pp. 394–395; Nathan & Marshall, No. 16; *Carl Zeiss Stiftung* v. *Herbert Smith & Co., supra,* at p. 435.
61 [1968] 1 W.L.R. 1555; (1969) 85 L.Q.R. 167 (P.V.B.).
62 *Ibid.* at pp. 1610, 1611; Companies Act 1948, s. 54.
63 *Walpole* v. *Lord Orford* (1797) 3 Ves.Jr. 402.

The agreement is binding between the parties. If it is broken by the first party to die, his estate will be liable in damages to the survivor.[64] If the breach and revocation is by the second party to die, it is hard to see how he or his estate could be sued at law. The estate of the first to die has lost nothing; and the intended beneficiaries were not parties to the contract. Equity steps in to help them.

But before any remedy can be obtained, an agreement [65] between the parties must be proved. The mere fact that the wills were made simultaneously and in the same form is not, of itself, proof of an agreement. But the court may infer an agreement from the conduct of the parties, the circumstances and the terms of the wills.[66]

> In *Re Oldham*,[67] a husband and wife made mutual wills in similar form; each spouse left his (or her) property to the other absolutely with the same provisions in the event of the other predeceasing. There was no evidence of an agreement that they should be irrevocable. After the husband's death, the wife married again, and made a new will which was quite different from the earlier one. The second will was upheld; Astbury J. saying: "The fact that the two wills were made in identical terms does not necessarily connote any agreement beyond that of so making them . . . there is no evidence . . . that there was an agreement that the trust in the mutual will should in all circumstances be irrevocable by the survivor who took the benefit." The parties had left their estates to each other "absolutely." They "may have thought it quite safe to trust the other. . . . But that is a very different thing from saying that they bound themselves by a trust that should be operative in all circumstances and in all cases." [68]

A will is always revocable; an agreement not to revoke it does not make it irrevocable.[69] Thus, if a will is physically destroyed, there will be an intestacy; and if it is revoked by a subsequent will, the later one will be admitted to probate. However, the executors under the proved will take subject to the trusts of the first will [70]; these trusts arise from the existence of the agreement between the parties, followed by the death of the first party, relying on the

[64] *Robinson* v. *Ommanney* (1883) 23 Ch.D. 285; but not where the revocation of the first will is by the subsequent marriage of the covenantor.
[65] *In the Goods of Heys* [1914] P. 192.
[66] *Dufour* v. *Pereira* (1769) Dick. 419; *Stone* v. *Hoskins* [1905] P. 194; *Re Hagger* [1930] 2 Ch. 190; Nathan & Marshall, No. 75; *Re Green* [1951] Ch. 148.
[67] [1925] Ch. 75; Nathan & Marshall, No. 74.
[68] *Ibid.* at pp. 88-89; *Gray* v. *Perpetual Trustee Co.* [1928] A.C. 391.
[69] *Vynior's Case* (1609) 8 Co.Rep. 81b.
[70] *In the Goods of Heys* [1914] P. 192; *Stone* v. *Hoskins* [1905] P. 194 (later will of first to die).

undertaking of the other party to observe the agreement. Of the leading case of *Dufour* v. *Pereira*,[71] Clauson J. said[72]: "*Dufour* v. *Pereira* decides that where there is a joint will . . . , on the death of the first testator the position as regards that part of the property which belongs to the survivor is that the survivor will be treated . . . as holding the property on trust to apply it so as to carry out the effect of the joint will."

ii. When does the Trust Arise? Mitchell says that there are three possibilities[73]: When the agreement was made: When the first testator dies: When the survivor dies. It is clear that no trust exists from the date of the agreement. For either party can revoke before either dies, on giving notice to the other[74]; and even notice is not necessary in the case of the first to die, for the survivor has notice on the first death and will not be prejudiced.[74] And the survivor in such circumstances is unable to establish any trust in his favour against the estate of the first to die.[75] Nor can the death of the survivor be the correct time. For where a beneficiary died between the date of the death of the first to die and the survivor, the estate of that beneficiary was able to claim its share on the ground that the interest was vested and there was no lapse.[76] Of these three possibilities, it seems therefore that the trust arises on the death of the first to die.

There is, however, a fourth possibility. That is that the trust arises when the survivor receives the benefit under the first will. This date is highly significant, if, as is submitted here, these trusts are constructive trusts, and they are imposed only where the survivor takes a benefit under the first will. Even if this is correct, however, the trust may relate back to the death. On this question there are dicta both ways, but no decision. Most of the dicta favour the view that the trust is imposed only where the survivor takes the benefit.[77] Clauson J., however, in *Re Hagger*[78] said *obiter* that the trust would arise "even though the survivor did not signify his election to give effect to the will by taking benefits under it."

[71] (1769) Dick. 419; a case of a joint will, but the same principles apply to mutual wills.
[72] *Re Hagger* [1930] 2 Ch. 190 at p. 195; Nathan & Marshall, No. 75.
[73] (1951) 14 M.L.R. 137 (J. D. B. Mitchell).
[74] *Dufour* v. *Pereira* (1769) Dick. 419 at p. 420.
[75] *Stone* v. *Hoskins* [1905] P. 194.
[76] *Re Hagger* [1930] 2 Ch. 190; Nathan & Marshall, No. 75; *cf. Re Gardner* (*No.* 2) [1923] 2 Ch. 230.
[77] *Dufour* v. *Pereira* (1769) Dick. 419 at p. 421; *per* Barnes P. in *Stone* v. *Hoskins* [1905] P. 194 at p. 197; *per* Astbury J. in *Re Oldham* [1925] Ch. 75 at p. 87; Nathan & Marshall, No. 74; *per* Sir John Collier in *Denyssen* v. *Mostert* (1872) L.R. 4 P.C. 236 at p. 255; Keeton, *Law of Trusts* (9th ed.), p. 200.
[78] [1930] 2 Ch. 190 at p. 195.

Whether or not the receipt of benefits is material will depend upon the type of trust imposed. If the trust is express, it must be possible to show who declared it, and when; or, if implied, there must be evidence from which the implication can be made. The survivor must be the person who declared it, if anyone, for it affects his property. He could not, however, at the date of the agreement, declare trusts of future property,[79] nor could the agreement be enforced as a covenant to settle, for the beneficiaries are volunteers; and there is no question here of trustees suing; for the survivor, if anyone, is the trustee. As we have seen, equity insists upon a clear manifestation of an intention to declare one's self a trustee.

On the other hand, there is no reason why the survivor should not be free to elect whether to keep to the agreement or to disclaim the benefits. No one can enforce the agreement against him. It would, however, be fraudulent in him to disregard the agreement *and* keep the benefits. This is a typical example[80] of the imposition of a constructive trust in order to prevent fraud or unjust enrichment.

iii. To What Property Does the Trust Attach? Subject always to a contrary intention, there are four possibilities; that the trust attaches to the property which the survivor receives from the estate of the first to die: or to all the property that the survivor owned at the time: or to all the property which the survivor owned at *his* death: or to all the property which the survivor owned at any time since the first death.

Clearly the trust must include property received from the first to die. If the will gave only a life interest, there is no scope for the trust. If the gift is absolute, the imposition of a trust in favour of ultimate beneficiaries will in effect reduce the survivor's interest to a life interest.

The decision in *Re Hagger*[81] that the interests of the beneficiaries are vested suggests that the trust attaches at least to all the property which the survivor had at the time of the first death. This means that a disposition *inter vivos* by the survivor would be a breach of trust; indeed it would make nonsense of the trust if he could so dispose of the property.[82] This leaves the question of acquisitions by the survivor by his own efforts after the first death. After all, the property acquired after the date of the wills by the first to die was included in his estate; and the agreement, in the absence of a

[79] *Ante*, p. 149.
[80] Like cases of fully secret trusts; *ante*, p. 162.
[81] [1930] 2 Ch. 190.
[82] See however Astbury J. in *Re Oldham* [1925] Ch. 75 at pp. 87, 88; Nathan & Marshall, No. 74, suggesting that the trust attaches only to property held by the survivor at death.

contrary provision, would apply to all property. The agreement thus acts like a covenant to settle after-acquired property, and the property becomes subject to the trust on its becoming vested in the trustee.[83] If this is correct, the effect of mutual wills is to reduce the survivor to the position of a life tenant; he may use the income, but the capital is held on trust for the ultimate beneficiaries.

A contrary intention will effect a different result.

In *Re Green*,[84] a husband and wife executed mutual wills in pursuance of a recited agreement so to do; each will gave the residuary estate to the other spouse, and, if the other spouse predeceased, the residue was to be divided into two moieties, one being considered as the testator's personal estate, the other as the benefit received from the other spouse. Vaisey J. held that the survivor could treat the first moiety as his own free property but . . .[85] "with regard to the other moiety . . . the first will must take effect, not as a will, but as evidence of a trust. . . ." This decision can be supported, it is submitted, on the ground that this was the agreement of the parties; it does not mean that the trusts in cases of mutual wills only apply to the property received from the first to die.

iv. The Survivor as Trustee. If the survivor becomes a trustee of all the property he owns, it is, to say the least, a very peculiar form of trusteeship. It is a sole trusteeship, with the trustee immediately interested, with the trusts declared by someone else's will, and with the beneficiaries unable to know until the trustee's (the survivor's) death whether mutual wills were made. There is very little opportunity in such circumstances to ensure that proper control over the trustees is maintained. Purchasers have no notice of the trusts, and the trust property may be lost on alienation to them.[86] And the survivor may have no idea that he is a trustee. If land is included in the trusts, it will presumably become settled land[87]; and because of the lack of knowledge of all parties concerned, may cause disputes and uncertainties as to title if it is alienated without observing the proper procedures laid down by the Settled Land Act 1925.[88] The possibilities of trouble are unlimited; they have not yet been properly worked out.[89]

[83] *Paul* v. *Paul* (1882) 20 Ch.D. 742; *Re Ralli's W.T.* [1964] Ch. 288.
[84] [1951] Ch. 148.
[85] *Ibid.* at p. 155.
[86] *Pilcher* v. *Rawlins* (1872) L.R. 7 Ch.App. 259.
[87] Because the survivor's interest is limited to a life interest, S.L.A. 1925, s. 1.
[88] ss. 13, 18.
[89] (1951) 14 M.L.R. 140–142 (J. D. B. Mitchell).

v. Conclusion. It is clear that the imposition by law of a trust in cases of mutual wills is a clumsy and inadequate way of dealing with a complicated problem. Persons who wish to leave property to each other in this way should be advised to consider most carefully the trusts on which they wish the property to be held; what property is to be included; who they wish to be trustees; what administrative powers the trustees should have; and how best the scheme desired can be carried out from an estate duty point of view. Merely to draft mutual wills and then leave the law to sort out such a host of problems is no service to a client. The law in this context, as in most other areas of constructive trusts, imposes a trust in an attempt to prevent one party obtaining an unjust benefit. It is a kind of salvage operation; a salvage of a wreck which competent legal advice would have avoided in the first place.

D. The Vendor under a Contract for the Sale of Land

It has many times been said by high authority that a vendor of land, on signing the contract of sale, becomes a trustee of the land for the purchaser.[90] Any changes in the nature of the property after that time, for example by fire or flooding, if they occur without the fault of the vendor, are at the purchaser's risk.[91] Beyond that, however, there is little agreement.[92] It is clear at least that this is not an ordinary trusteeship. Cotton L.J. said that the vendor was trustee only in a qualified sense[93]; Lord Greene M.R. called him a quasi-trustee,[94] and Lord Cairns[95] explained that the trustee was entitled to protect his own interest in the property. Similarly, the vendor is entitled to keep for himself the rents and profits of the land until completion of the sale, and to retain possession against the purchaser until the purchase price has been paid; and he retains a lien on the land for the price if the land is conveyed before the price is paid[96]; and time runs under the Limitation Act 1939 against the vendor in respect of possession of the land.[97] The relationship between the parties contains a number of aspects in which they are hostile and the vendor self-interested.

[90] Jessel M.R. in *Lysaght* v. *Edwards* (1876) 2 Ch.D. 499 at p. 507; (1959) 23 Conv.(N.S.) 173 (V. G. Wellings); Waters, *The Constructive Trust*, Chap. 2.
[91] *Paine* v. *Meller* (1801) 6 Ves.Jr. 349; as to insurance, see L.P.A. 1925, s. 47; *post*, p. 344.
[92] Cotton, Brett and James L.JJ. in *Rayner* v. *Preston* (1881) 18 Ch.D. 1 expressed different views on the situation. Farrand, *Contract and Conveyance*, Chap. VII.
[93] *Rayner* v. *Preston*, *supra*, at p. 6; see also Kekewich J. in *Royal Bristol Permanent Building Society* v. *Bomash* (1887) 35 Ch.D. 390 at p. 397 ("a modified sense").
[94] *Cumberland Consolidated Holdings Ltd.* v. *Ireland* [1946] K.B. 264 at p. 269.
[95] *Shaw* v. *Foster* (1872) L.R. 5 H.L. 321 at p. 338.
[96] *Mackreth* v. *Symmons* (1808) 15 Ves.Jr. 329.
[97] *Bridges* v. *Mees* [1957] Ch. 475. *Post*, p. 410 *et seq.*

Once the date for completion has arrived and the price is paid in full, the vendor must immediately convey. This is an example of a trusteeship arising because the bare legal estate is in one person, and the entire beneficial ownership in another.[98] Until that situation has arisen, it does not seem that any useful purpose is served by stating that the relationship between the parties is one of trustee and beneficiary. The position at law is that they are parties to a contract and no more. In equity additional rights arise by reason of the fact that specific performance is available as a remedy in favour of an innocent party. Equity then treats as done that which ought to be done, and considers the purchaser as being the owner in equity. But many other factors in their relationship remain; each party is continuing to guard his own interests against the other; and does so in a way which is quite inconsistent with the existence of the relationship of trustee and beneficiary.

No doubt it is too late now to say that the relationship is not that of trustee and beneficiary. The terminology must, however, be received with reserve; and the situation must, at best, be treated as anomalous.[99]

E. The Mortgagee in Possession of Purchase Money after Exercising the Power of Sale

A mortgagee is not a trustee of his power of sale; he may exercise it in his own interests.[1] On exercising the power, a legal mortgagee, on receiving the purchase money, is entitled to take all that is due to him under the mortgage, and is required to hold the surplus on trust for subsequent mortgagees, and for the mortgagor. The trust was originally imposed by equity; it is now governed by statute.[2]

F. Purchase of Property Subject to a Trust

Where property is subject to a trust, anyone who takes the property does so subject to the trust unless he can sustain the onus of proving that he was a bona fide purchaser of the legal estate for value without notice.[3] An intermeddler in whom trust property becomes vested is liable under this head.[4]

98 *Post*, p. 236.

99 (1959) 23 Conv.(N.S.) 173 (V. G. Wellings).

1 *Waring* v. *London and Manchester Assurance Co. Ltd.* [1935] Ch. 310; *cf.* Building Societies Act 1962, s. 36, requiring a Building Society to obtain the best price reasonably obtainable.

2 L.P.A. 1925, s. 105.

3 *Pilcher* v. *Rawlins* (1872) L.R. 7 Ch.App. 259; Tiley, p. 29; *ante*, p. 21; *Lee* v. *Sankey* (1873) L.R. 15 Eq. 204, p. 211; *Nelson* v. *Larholt* [1948] 1 K.B. 339; *Baker* v. *Medway Building and Supplies Ltd.* [1958] 1 W.L.R. 1216.

4 *Barnes* v. *Addy* (1874) L.R. 9 Ch.App. 244; Nathan & Marshall, No. 79; *ante*, p. 225.

An innocent volunteer is under a less strict liability than one who knows that he takes the property in breach of trust.[5] Being a volunteer, he cannot take free of the trust. While he has the property, the beneficiaries may claim it from him or require him to apply it for their benefit. It is submitted, however, that he will be under no personal liability if he has parted with the property without having notice of the trust[6]; and, apparently, though the justification for the rule is not clear, if he has innocently mixed the trust property with his own, he has an equal claim with the beneficiaries.[7]

G. Conveyance by Fraud

Where property has been obtained by the fraud of the defendant, he may be compelled to hold it as a constructive trustee. The trust is not imposed in every case; while it is difficult to state the principle governing the circumstances in which the trust will be imposed, some broad distinctions are in practice clear.

A purchaser of a chattel under a contract induced by fraud takes a voidable title, and he can pass a valid title to a bona fide purchaser without notice.[8] Such a result would be consistent with the fraudulent purchaser holding as constructive trustee.[9] "The injured party may affirm the contract, and bring an action for damages for deceit. Or he may elect to rescind the contract . . . and to sue for damages for any loss suffered."[10] And a purchase of land may be rescinded for fraud,[11] or for innocent misrepresentation.[12]

On the other hand, situations in which a will is fraudulently revoked, or where the testator is fraudulently prevented from making a will, or fraudulently induced to leave property to a legatee or devisee, are all appropriate for the imposition of a constructive trust. These situations are more fully discussed under the heading of secret trusts.[13] There is no reason, however, why such a principle should not apply to conveyances *inter vivos*.[14]

[5] *Re Diplock* [1948] Ch. 465; Tiley, p. 349; *Restatement of Restitution*, § 203.
[6] No English authority is known. *Restatement of Restitution*, § 203. The personal claim in *Re Diplock*, *supra*, was on a different ground; *post*, p. 475.
[7] *Re Diplock*, *supra*; (1959) 75 L.Q.R. 234 (R. H. Maudsley); *post*, p. 426.
[8] *Phillips* v. *Brooks* [1919] 2 K.B. 243; *Lake* v. *Simmons* [1927] A.C. 487; Sale of Goods Act 1893, s. 23.
[9] For a bona fide purchaser for value would take free from the trust.
[10] Anson, *Law of Contract* (22nd ed.), pp. 215–216.
[11] See Williams, *Vendor and Purchaser* (4th ed.), 810; *Emmet on Title* (15th ed.), 231.
[12] Misrepresentation Act 1967, s. 1.
[13] *Ante*, p. 155 *et seq.*
[14] *Rochefoucauld* v. *Boustead* [1897] 1 Ch. 196; *Bannister* v. *Bannister* [1948] 2 All E.R. 133; Nathan & Marshall, No. 23.

H. Where the Legal Estate is in X and the Beneficial Interest in Y

In *Hardoon* v. *Belilios*,[15] Lord Lindley said: "All that is necessary to establish the relationship of trustee and *cestui que trust* is to prove that the legal title was in the plaintiff and the equitable title in the defendant." The question at issue in the case was whether an employee, in whose name shares were registered for the convenience of his employers who were stockbrokers, was entitled to be reimbursed in respect of calls on the shares which he was forced to pay. The employee never had any beneficial interest in the shares, and no trust had at any stage been declared. The Privy Council held that he was entitled to be reimbursed under the rule that a trustee is entitled to reimbursement of his expenses; and if necessary from the beneficiaries' own resources.

If the employers were trustees and the employee a beneficiary, what sort of trust is this? None had been declared. Perhaps there was an implied trust; but this was not supported by any evidence. Whether there was evidence of intention or not, the situation was one in which the parties were treated as trustee and beneficiary; and may be regarded as a form of constructive trust.

I. Liability to a Proprietary Remedy

We have seen that a feature which distinguishes liability as a constructive trustee from personal liability is that a claimant under a constructive trust can say that he is owner in equity of the property in dispute. It is in his interest to do so, if the property has increased in value, if he wishes to have specific recovery, or if the trustee is insolvent. We saw that special problems arise with claims for money, and we will see that there are complicated rules for determining these questions.[16] The important point to make now is this: the plaintiff has a right to his proprietary remedy if he can show a constructive trust. We may ask when, ideally, a plaintiff should have the proprietary remedy; when, essentially, he should have this priority over the general creditors. The *Restatement*[17] says: when the defendant was unjustly enriched; because the defendant should never have had the money; nor should his creditors enjoy what he should never have had. Then the plaintiff has a proprietary remedy; having that, we then say that there is a constructive trust. In other words: Does the existence of a constructive trust entitle the plaintiff to a proprietary remedy? Or should we decide when, ideally, he should have the remedy; and then say that the constructive trust is the appropriate way to exercise it?

15 [1901] A.C. 118.
16 *Post*, p. 418.
17 *Restatement of Restitution*, § 160.

CHAPTER 14

TRUSTS WHICH CONTRAVENE THE LAW

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A TRUST, though otherwise valid, may fail because it contains an element of unlawfulness or immorality. It is impossible to categorise all the possible grounds of unlawfulness, and only some of the more important ones can be mentioned here. If a trust fails on this ground, the property is usually held upon a resulting trust.[1] However, the illegality may be such (*e.g.*, if the plaintiff is fraudulent) as to preclude recovery by the settlor or his representatives under the principle *in pari delicto potior est conditio defendentis*.[2]

1. TRUSTS DIRECTED TO OBJECTS THAT CONTRAVENE THE GENERAL POLICY OF THE LAW

A. Purposes Contrary to Law, Public Policy or Morality

An obvious example is provided by *Thrupp* v. *Collett*,[3] in which case a testator attempted to provide for paying the fines of convicted

[1] *Ante*, p. 217.

[2] See Lord Eldon in *Muckleston* v. *Brown* (1801) 6 Ves.Jr. at p. 69; *ante*, p. 217. An illegal consideration may have the effect of rendering void an otherwise lawful trust, but a resulting trust to the settlor may not necessarily follow: *Ayerst* v. *Jenkins* (1873) L.R. 16 Eq. 275. A covenant to settle will not be enforced if given for an illegal consideration: *Symes* v. *Hughes* (1870) L.R. 9 Eq. 475.

[3] (1858) 26 Beav. 125.

poachers. Sir John Romilly M.R. held the trust void on the ground that it was against public policy. It would, however, apart from this ground, probably have failed on the ground that it was a (non-charitable) purpose trust.[4]

Further " the general immoral tendency [of a trust] would make it void." [5] In 1932, Maugham J. said that [6] " it is settled by authority that, in general, future illegitimate children cannot be provided for by deed, such gifts being *contra bonos mores*, as tending to encourage immorality; and the same observation is true as to bequests to the illegitimate children of a third person to be begotten after the death of the testator; *Occleston* v. *Fullalove*." [7] It is obvious that a bequest to the testator's illegitimate children does not fail on this ground, for they are all in being at the date on which the will takes effect.[8] Objections on the ground of morality in respect of illegitimate children do not carry the same weight as they did a century ago; but the older cases are not overruled.[9]

B. Conditions Precedent and Conditions Subsequent

Trusts involving illegality which do not also fail as purpose trusts, often arise in connection with the validity of conditions imposed upon otherwise valid gifts. The problems here are those of the validity of conditions precedent and conditions subsequent, rather than problems of the law of trusts as such. It is not always easy to determine whether a condition is intended to operate as a condition precedent or subsequent; and, in relation to conditions precedent to gifts of personalty, there is the unattractive distinction between conditions so unlawful as to render the whole gift void, and those that allow the donee to take unfettered by the condition.[10]

Conditions that have a vitiating effect when attached to trusts are illustrated by conditions calculated to facilitate the future separation of husband and wife, or to bring about the separation of a parent from his child.[11] Trusts in restraint of marriage are particularly difficult. Conditional or executory gifts over, divesting an estate on

4 *Ante*, p. 195 *et seq.*
5 *Thornton* v. *Howe* (1862) 31 Beav. 14 at p. 20, *per* Romilly M.R.
6 *Re Hyde* [1932] 1 Ch. 95 at p. 98.
7 (1874) L.R. 9 Ch.App. 147 at p. 171.
8 *Occleston* v. *Fullalove*, *supra*.
9 *Re Hyde*, *supra*, at p. 98. The property rights of illegitimate children are substantially improved by Family Law Reform Act 1969, Part II, which will render inapplicable some of the earlier cases excluding claims to property on the ground of illegitimacy. See also *Jarman on Wills* (8th ed.), pp. 1750–1784.
10 *e.g.*, *Re Elliott* [1952] Ch. 217. See generally *Jarman on Wills*, pp. 1457–1458.
11 *e.g.*, *Re Piper* [1946] 2 All E.R. 503; *Re Sandbrook* [1912] 2 Ch. 471; *Re Borwick* [1933] Ch. 657; *Re Johnson's W.T.* [1967] Ch. 387.

marriage, are void, if their object is to restrain marriage altogether.[12] But they are not void if they are to operate only in the event of a second marriage.[13] Nor are they void if the condition is only in partial restraint of marriage, that is to say, in restraint of marriage with certain persons, or a certain class[14]; and where property is *limited* to a person *until* marriage and then to other beneficiaries, the limitation is good.[15]

Another important illustration is provided by *Re Brown*.[16]

> A testator devised realty amongst his four sons, but subject to a condition which would have produced forfeiture of his interest by any son who mortgaged or sold his interest other than among his brothers. The condition was held to be equivalent to a general restraint on alienation, and therefore void, since the class of permitted alienees was small and bound to get smaller.

Restraints on alienation may be valid if the restraint is not general.[17] And so are restraints even of a general nature if they take the form of a *limitation*, and not a condition[18]; but such limitations must still take effect subject to the rule against perpetuities.

2. Perpetuity and Inalienability

It is necessary to consider two aspects of this subject. First, the principle behind the rule against remoteness of vesting must be demonstrated, and secondly the existence of the so-called rule against indefinite duration, and its relation to the principle of inalienability, can be discussed.

A. Remoteness of Vesting

The rule against perpetuities is generally stated in the words of Gray: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[19]

The rule applies to trusts generally, and to powers of appointment, but not to contracts. It is discussed at length in textbooks on

[12] *Lloyd* v. *Lloyd* (1852) 2 Sim.(N.S.) 255.
[13] *Allen* v. *Jackson* (1875) 1 Ch.D. 399.
[14] *Jenner* v. *Turner* (1880) 16 Ch.D. 188. In the case of personalty, such a condition will be ineffective unless the will contains an explicit gift over to another legatee: *Leong* v. *Lim Beng Chye* [1955] A.C. 648.
[15] *Re Lovell* [1920] 1 Ch. 122. See *post*, p. 241, for these conveyancing distinctions, and also *Re Dugdale* (1883) 38 Ch.D. 176 at pp. 179–181 *per* Kay J.
[16] [1954] Ch. 39.
[17] See Race Relations Act 1968, s. 5, forbidding racial discrimination in certain forms of disposal of housing accommodation, business premises and land.
[18] *Re Dugdale*, *supra*, at pp. 178–181, *per* Kay J.
[19] Gray, *Rule against Perpetuities* (4th ed.), s. 201.

property,[20] and need not be dealt with here. It is necessary to emphasise, however, that, though the purpose of the rule is to prevent the tying up of property for an undue future period, the rule is concerned with the *commencement* of interests, and not their *duration* or with *alienability* as such. The effect of the rule is to render void an interest that might commence ("vest"[21]) beyond a certain future time, known as the perpetuity period.[22]

> In *Re Lord Stratheden and Campbell,*[23] there was a bequest of an annuity to a regiment to take effect after the appointment of the next lieutenant-colonel; the gift failed because that appointment *might* not occur within the relevant perpetuity period.

If a gift is void for perpetuity, this commonly produces a resulting trust; but not necessarily, for another gift may be accelerated to take the place of the void gift; and a prior gift might become absolute instead of being defeasible.

The operation of the rule has been considerably altered by the Perpetuities and Accumulations Act 1964. It is now possible, as an alternative to a period measured by "lives in being," to select a period of anything up to eighty years within which all interests must vest.[24] There is also a "wait and see" period; interests are no longer declared void because they *might* vest outside the period; any interest is valid until it becomes clear that it will *in fact* vest outside the period. The Act only affects instruments coming into effect after July 16, 1964.

This rule, along with the new Act, therefore prevents trusts from containing beneficial interests limited to commence too far in the future. In the realm of charitable trusts, the rule needs special consideration.[25]

B. Perpetual Duration

The prohibition of too remote vesting looms so large in the law of property that there has been a tendency to suppose that rules against perpetuity are directed against no other object. But the problem of duration arises in the law of non-charitable purpose trusts. The

20 Cheshire, p. 237 *et seq.*; M. & W., Chap. 5, part 4; Morris and Leach; Maudsley and Burn, Chap. 4.
21 This, like the other aspects of the rule, is a highly technical matter.
22 This was not a fixed period, but depended on "lives in being," whose identity is dependent on the disposition itself.
23 [1894] 2 Ch. 265.
24 s. 1. It is important to note that the 80-year period is concerned only with the commencing ("vesting") of interests *within* that period: it is not applied to purpose trusts: Perpetuities and Accumulations Act 1964, s. 15 (4), *post*.
25 *Post*, pp. 253, 283 *et seq.*

problem is: if the gift vests immediately, and is not a charitable gift, will it be invalidated if, according to its terms, it is to last indefinitely? The answer is "yes."

But another point should be borne in mind. If a gift is made to a corporation, it cannot fail on the ground of duration any more than a gift of a fee simple to an individual can; thus, in *Bowman* v. *Secular Society*,[26] a gift to the "Secular Society," a society devoted to furthering anti-Christian beliefs, having survived an attack on the grounds of public policy, had nothing to fear on the score of perpetuity, as the Society was a duly registered company limited by guarantee.[27]

Gifts for non-charitable purposes, in so far as they may exist at all,[28] are permitted only for a limited period, by what can conveniently be called the rule against perpetual duration.[29] The permitted period is that of lives in being and twenty-one years,[30] as with the remoteness of vesting rule; but here it seems that the alternative of eighty years is not available.[24]

C. Inalienability

A word of warning is needed on the use, in this context, of the word "inalienability," and the so-called rule against it. Confusion has arisen because the question "What is it that is being rendered inalienable?" is too rarely asked.

In *Re Chardon*,[31] a testator gave the income of a fund to a cemetery company "during such period as they shall continue to maintain and keep in good repair two specified graves"; and there was a gift into residue on the company's failure to do so. The rule preventing validly created beneficial interests from being substantially inalienable would not arise on this limitation, as there is nothing to prevent the cemetery company from alienating its own interest.[32] But, Romer J. said "the cemetery company and the persons interested in the legacy subject to the interest of the cemetery company could combine tomorrow and dispose of the whole legacy. The trust does

[26] [1917] A.C. 406; *ante*, p. 201. This point should have been thought about in drafting the will in *Re Hummeltenberg* [1923] 1 Ch. 237; Nathan & Marshall, No. 32; *post*, p. 265.

[27] Gifts to unincorporated societies can be validated only if they can be construed as gifts to the individual members; *ante*, p. 127.

[28] *Ante*, p. 195.

[29] *Ante*, p. 197. Morris & Leach, pp. 326–327. A trust for beneficiaries is not affected by the rule against duration, even if the gift is to be enjoyed only for specified purposes; *Re Denley's Trust Deed* [1969] 1 Ch. 373.

[30] The authorities are neither explicit nor satisfactory. *Ante*, p. 198, n. 19.

[31] [1928] Ch. 464.

[32] *Ante*, p. 239. *Quaere* if the obligation is personal to the specified cemetery company.

not, therefore, offend the rule against inalienability." [33] This introduces a confusion. For Romer J. refers, not to *an interest* being alienable, but to a capital *fund* being alienable. This is quite a different idea; for the investments comprising a fund may be varied, or transferred to different trustees; and in that sense the fund is alienable. In *Re Chardon* there was not a purpose trust, for there was no requirement that the income should be applied to maintain the graves. The gift was to the cemetery company, determinable on the graves not being maintained. This device ensured the testator's object [34]; for there is no rule which says that when *in effect* assets are devoted to purposes in perpetuity, the gift is void. The matter is treated as one of conveyancing devices.[35]

It is submitted that there is no single "rule against inalienability." There is, first, the rule against perpetual duration, restricting the period of operation of non-charitable trusts (in the few cases where they are valid). Secondly, a rule against the inalienability of beneficial interests applies in certain circumstances.[36] Finally, the rule against perpetuities governs the limits to which the vesting of beneficial interests can be projected into the future. Whatever successive interests are created in property, the property to which those interests are attached remains alienable. In the case of land alienability is ensured by the Settled Land Act 1925, and the legislation relating to trusts for sale.[36a] In the case of invested funds, the trustees can always vary the investments. It is important therefore in discussions of "inalienability" to make clear which aspect of these cumulative rules is under consideration.

3. Attempts to Keep Property from Creditors

A. General

A creditor can demand payment from his debtor out of the debtor's property. If the debtor's property is insufficient to pay his debts, he is insolvent, and it will not be possible to pay all the creditors in full. Generally speaking, before bankruptcy the debtor may

33 *Re Chardon* [1928] Ch. 464 at p. 470. Such a power does not necessarily exclude the rule against perpetuities either; the idea proves too much.

34 It would now be caught by Perpetuities and Accumulations Act 1964, s. 12; see *post*, p. 285, and *cf.* note 21 on p. 208, *ante*.

35 *Ante*, p. 202. There is a substantial literature on this topic. See especially Gray, *Rule against Perpetuities* (4th ed.), Appendix H; 15 Harv.L.R. 509 (S. C. Gray); 33 L.Q.R. 236, 357 (C. Sweet); 53 L.Q.R. 24 (W .O. Hart); 54 L.Q.R. 258 (M. J. Albery); (1961) 25 Conv.(N.S.) 56 (J. D. Davies). The basic distinction between determinable and conditional interests is explained *ante*, p. 172, and *post*, p. 283.

36 *Ante*, p. 239.

36a S.L.A. 1925, ss. 1, 38, 106; L.P.A. 1925, s. 28.

choose which creditors he pays first [37]; but after bankruptcy provision is made by the bankruptcy law for a fair sharing out of his property.

When a person foresees the danger of future insolvency—as where he is entering upon a business venture—there is the temptation to put property out of the reach of creditors, by, for example, creating a settlement in favour of the family. If the venture succeeds the profits will flow in; if it fails, the creditors will be unpaid; but the family will be cared for.[38] It may also be that a settlement is made for other reasons, such as the reduction of estate duty,[39] but insolvency subsequently occurs. The question for consideration here is the extent to which a creditor can upset dispositions made by debtors of property which would otherwise be available for the creditors, whether or not there is a bankruptcy.

B. Voluntary Settlements Independent of Bankruptcy

i. Law of Property Act 1925, s. 172. This section replacing 13 Eliz. I, c. 5, reads, so far as is relevant:

> (1) "Save as provided in this section, every conveyance of property, made whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable at the instance of any person thereby prejudiced.
>
> (3) "This section does not extend to any estate or interest in property conveyed for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the conveyance, notice of the intent to defraud creditors."

The statute applies to settlements of every kind of property; freeholds, leaseholds, goods and chattels, money and stock,[40] goodwill and stock-in-trade of a business,[41] policy moneys,[42] debts and choses in action which are capable of attachment or of being otherwise made available for the benefit of creditors, and equitable reversionary interests in personal estate.[43]

ii. Proof of Intent to Defraud. The party seeking to set aside the settlement must prove an intent to defraud. He will usually have to rely on inferences from the facts, for he cannot expressly prove

[37] *Middleton* v. *Pollock* (1876) 2 Ch.D. 104.
[38] "If I succeed in business, I make a fortune for myself. If I fail, I leave my creditors unpaid. They will pay the loss."; *per* Jessel M.R.; in *Re Butterworth, ex p. Russell* (1882) 19 Ch.D. 588 at p. 598.
[39] *Ante*, p. 185 *et seq.*
[40] *Barrack* v. *M'Culloch* (1856) 3 K. & J. 110; *Warden* v. *Jones* (1857) 2 De G. & J. 76.
[41] *French* v. *French* (1855) 6 De G.M. & G. 95; *Neale* v. *Day* (1858) 28 L.J.Ch. 45.
[42] *Stokoe* v. *Cowan* (1861) 29 Beav. 637.
[43] *Ideal Bedding Co.* v. *Holland* [1907] 2 Ch. 157.

what was in the mind of the settlor. There is no doubt that he can rely on inferences drawn from the surrounding circumstances to establish a prima facie case of intent to defraud.[44]

A disputed question is whether, on the principle that a man must be taken to intend the natural consequences of his acts, the surrounding circumstances will be allowed to establish an irrebuttable presumption of intent to defraud. Lord Hatherley L.C. in *Freeman* v. *Pope* [45] thus laid down the rule: "If a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it to be effectual) that some creditors must remain unpaid, it would be the duty of the judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute."

Such an extreme rule for the proof of fraud was, however, described as "monstrous" by Lord Esher M.R. in *Re Wise, ex p. Mercer*,[46] where the defendant was able to satisfy the court that he did not intend to defraud.

In *Re Wise*,[47] a master mariner, engaged to a girl in England, married a different one in Hong Kong. The English girl started an action for breach of promise; and the same post brought to Hong Kong the writ in the action, and also news that Wise had become entitled, on his mother's death, to a legacy of £500. Not being otherwise indebted, and thinking that nothing would come of the action for breach, he settled the £500 on his wife and children. The English girl obtained judgment for £500, and took steps to upset the settlement. She was unable to prove an intent to defraud and the settlement stood.

The better view appears to be that the surrounding circumstances are capable of establishing a prima facie case of intent to defraud.[48] The onus then is on the settlor to disprove this if he can. All relevant factors should be taken into consideration; and the fact that the settlement was voluntary makes the task of upholding it all the more difficult.

[44] *Twyne's Case* (1602) 3 Co.Rep. 80b; *Reese River Co.* v. *Attwell* (1869) L.R. 7 Eq. 347 at p. 351; *Crossley* v. *Elworthy* (1871) L.R. 12 Eq. 158; *Mackay* v. *Douglas* (1872) L.R. 14 Eq. 106. Some hold the view that if the settlement was voluntary, and the settlor was insolvent at the time, and that shortly afterwards he engaged in trade of a hazardous character, the burden of disproving intent passes to those interested under the settlement (see Halsbury, Vol. 17, p. 657; Pettit, p. 115).

[45] (1870) L.R. 5 Ch.App. 538 at p. 541; *Re Holland* [1902] 2 Ch. 360; *Re Eichholz* [1959] Ch. 708.

[46] (1886) 17 Q.B.D. 290 at p. 298.

[47] (1886) 17 Q.B.D. 290.

[48] *Thompson* v. *Webster* (1859) 4 Drew. 628 at p. 632; *Godfrey* v. *Poole* (1888) 13 App.Cas. 497 (a trust to pay debts and to hold the surplus upon family trusts).

iii. Preference of Creditors inter se. The statute is concerned with settlements intended to defraud creditors, and not with the preference of one creditor over another. Thus a declaration of trust in favour of one creditor by an insolvent settlor, who is to his own knowledge insolvent, and made with the intention of preferring that creditor, cannot be challenged by other creditors on this ground.[46] If he had been adjudicated bankrupt on a petition presented within three months of the declaration of the trust, it would have been deemed fraudulent and void as against the trustee in bankruptcy.[50]

iv. Revocable Settlements. The reservation of a power to revoke the settlement is usually treated as an indication of an intent to defraud because the property, though settled, remains under the settlor's control. But in *Re H. W. Baker*,[51] a power of revocation with the consent either of the trustees or of a judge of the Chancery Division was treated as being available to the trustee in bankruptcy, and as showing that "so far from intending to defraud creditors, the whole object of this settlement was to protect the bankrupt against himself, without preventing a trustee in bankruptcy getting the benefit of whatever property there was available for the payment of the debts in a proper case." [52]

v. "Any person thereby prejudiced." The settlement may be set aside by existing or subsequent creditors, and they may do so even though all the debts existing at the date of the settlement have been paid.[53] The satisfaction of all debts existing at that time may make the proof of fraudulent intent more difficult; but this was clear in *Re Butterworth, ex p. Russell*,[54] where a prosperous baker made the settlement immediately before purchasing a grocer's business, a trade in which he had no experience. The settlor cannot of course himself set aside the settlement unless it contains an express power of revocation.

vi. "For valuable consideration and in good faith, or upon good consideration and in good faith." Interests which have been acquired under the settlement for valuable consideration (including those acquired in consideration of marriage) and in good faith (discussed below) [55] are protected. A problem arises as to the meaning of the phrase "upon good consideration." It appears from the wording of

[49] *Middleton* v. *Pollock* (1876) 2 Ch.D. 104; *ante*, p. 140.
[50] Bankruptcy Act 1914, s. 44 (1); see *Sharp* v. *Jackson* [1899] A.C. 419.
[51] [1936] Ch. 61.
[52] *Ibid.* at p. 67, *per* Farwell J.
[53] *Mackay* v. *Douglas* (1872) L.R. 14 Eq. 106.
[54] (1882) 19 Ch.D. 588.
[55] *Post*, pp. 246–247.

subsection (3) to have a meaning independent of "valuable consideration." The most natural explanation is that it is intended to include interests obtained in consideration of natural love and affection.

The statute 13 Eliz. 1, c. 5, had given protection to persons taking in good faith "upon good consideration"; but this had been held to include valuable consideration only (including marriage) and to exclude natural love and affection. The reason for this was that, as was said in *Twyne's Case* [56]: "if consideration of nature and blood should be a good consideration within this proviso, the statute would serve for little or nothing, and no creditor would be sure of his debt." In other words, the most common way of defrauding creditors is to make settlements in favour of the family; to exclude such settlements from the operation of section 172 would render the section almost useless.

This aspect of section 172 has not been discussed by the courts. It was relevant in *Re Eichholz*,[57] where Harman J., without referring to the point, treated the subsection as if it had made no alteration to the law. In that case:

> Trustees administering the estate of Eichholz in bankruptcy claimed to recover from his widow a house and contents which he had purchased for her. He was hopelessly insolvent at that time, having, as a solicitor, misappropriated large amounts of clients' funds. His widow knew nothing of this, and was bona fide throughout. The trustees succeeded, no mention being made by Harman J., nor apparently in argument, of the possibility of natural love and affection being a sufficient consideration to bring her within the protection of the section.

The section also protects a purchaser for value of an interest created by an original voluntary settlement.

> In *Halifax Joint Stock Banking Co.* v. *Gledhill* [58] a settlement which was fraudulent against creditors reserved a reversionary life interest for the settlor. He subsequently charged this interest by equitable mortgage to a mortgagee who had no notice that the settlement was fraudulent. The creditors of the settlor succeeded in having the settlement declared void, except as regards the interest of the equitable mortgagee.

vii. "Good faith . . . not having . . . notice of the intent to defraud creditors." Even those who give consideration are not protected

[56] (1602) 3 Co.Rep. 80b at 81b.
[57] [1959] Ch. 708.
[58] [1891] 1 Ch. 31.

unless they take in good faith and without notice of the intent to defraud creditors.[59] The question usually arises in the context of a settlement in consideration of marriage; for this is the only situation within the family in which valuable consideration is likely to be given. If the wife knowingly participates in the fraud, she is not protected; as where the wife had been the husband's mistress, and it was clear that, but for a device to defraud creditors, the parties would never have married at all.[60] The wife is protected if she is unaware of the husband's insolvency.[61] Further, it seems that the knowledge by the wife of the husband's indebtedness is not in itself sufficient to deprive her of protection; she must be "party or privy to the fraud."[62]

viii. Surplus. In some cases there may be a surplus after payment of creditors. Where there is such a possibility the settlement will not be ordered to be delivered up to be cancelled, but the court ought to provide for setting it aside only so far as is required for the payment of creditors. The order will, therefore, direct the trustees to join and concur in all acts necessary for making the property comprised in the settlement available for satisfying the claims of the creditors.[63]

C. Bankruptcy Act 1914, s. 42

i. Subsection (1). Section 42 (1) provides as follows:

> "Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer, in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after the marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement be void as against the trustee in bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor

[59] *Holmes* v. *Penney* (1856) 3 K. & J. 90; *Holloway* v. *Millard* (1816) 1 Madd. 414; *Thompson* v. *Webster* (1859) 4 Drew. 628.
[60] *Colombine* v. *Penhall* (1853) 1 Sm. & G. 228; *Bulmer* v. *Hunter* (1869) L.R. 8 Eq. 46; *Re Pennington* (1888) 5 T.L.R. 29.
[61] *Ex p. McBurnie* (1852) 1 De G.M. & G. 441; *Kevan* v. *Crawford* (1877) 6 Ch.D. 29.
[62] *Per* Stirling J. in *Re Reis* [1904] 2 K.B. 769 at p. 776.
[63] *Ideal Bedding Co.* v. *Holland* [1907] 2 Ch. 157.

in such property passed to the trustee of such settlement on the execution thereof."

ii. What is a Settlement? For the purposes of section 42, "settlement" is defined as including "any conveyance or transfer of property."[64] It will however only include such dispositions as are in the nature of settlements[65]; it must be one where the donor contemplated the retention of the property by the donee, either in its original form or in a form into which it can be traced,[66] and excludes conveyances or transfers which cannot be traced, as, *e.g.*, where there is a gift of money to be employed in a business or in the purchase of a business, and the money is so employed and spent, the business itself not being settled.[67] However it is immaterial what conveyancing forms are used; it has been held that the purchase of a house by a husband in the name of a wife is a settlement.[68]

iii. The Date of the Settlement. The application of the section is limited as to time:

(a) If made within two years of the bankruptcy, the settlement is void against the trustee in bankruptcy, regardless of the financial stability of the settlor at the date of the settlement.

(b) If made two to ten years from the date of the bankruptcy, it is void against the trustee in bankruptcy, *unless* the parties claiming under the settlement can prove both that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and also that the interest of the settlor passed to the trustee[69] of the settlement on the execution thereof.

It has been held that the second requirement is satisfied where a settlor declared himself trustee of a settlement which reserved the ultimate interest for himself.[69]

iv. Exceptions. It will be seen that three forms of settlement are excluded by the section:

(a) A settlement made before and in consideration of marriage.[70]

(b) A settlement in favour of a purchaser (or incumbrancer) who acts in good faith[71] and gives valuable consideration.[72]

64 s. 42 (4).
65 *Re Tankard* (1899) 2 Q.B. 57 at p. 59.
66 *Re Plummer* [1900] 2 Q.B. 790.
67 *Re Player* (1885) 15 Q.B.D. 682; *Re Plummer, supra.*
68 *Re A Debtor* [1965] 1 W.L.R. 1498.
69 *Shrager* v. *March* [1908] A.C. 402.
70 See *Re Downes* [1898] 2 Ir.R. 645; Pettit, p. 123.
71 *Mackintosh* v. *Pogose* [1895] 1 Ch. 505.
72 *Re Pope* [1908] 2 K.B. 169 (in consideration of refraining from divorce proceedings); *Hance* v. *Harding* (1888) 20 Q.B.D. 732; Pettit, p. 124.

(c) A settlement made on the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife.

This exception was designed to meet the case of property coming to the husband under the law as it applied to marriages prior to 1882. It has been held to apply also to property coming to the husband on his wife's intestacy before 1926[73]; and there seems to be no reason why it will not apply also to the husband's rights on her intestacy after 1925.

(d) Under the Married Women's Property Act 1882, s. 11, a policy of assurance effected by any man on his own life and expressed to be for the benefit of his wife or children creates a trust in their favour and is not liable for his debts; unless it is proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, in which case the creditors are entitled to receive out of the policy moneys a sum equal to the amount of the premiums paid.

v. Void means Voidable. A settlement is valid until the trustee in bankruptcy takes steps to avoid it. Further, it was held in *Re Brall*[74] that a bona fide purchaser for value from a beneficiary under such a voluntary settlement has a good title against the trustee in bankruptcy even if he purchased with notice that the donee claimed under a voluntary settlement.

vi. Time of Avoidance of Settlement. In the law of bankruptcy, the title of the trustee relates back to the act of bankruptcy.[75] Where there is an act of bankruptcy, therefore, bona fide purchasers require a special statutory protection.[76] But a settlement which comes under section 42 is not an act of bankruptcy, and it was decided in *Re Carter and Kenderdine's Contract*[77] that a voluntary settlement is not void as against the settlor's trustee in bankruptcy from its date, but only from the time when the trustee's title accrues; and so, if before that time the property comprised in the settlement has been sold to a bona fide purchaser for value, the title of the purchaser will be good as against the trustee. Lindley L.J. pointed out that the words "void as against a trustee in bankruptcy" cannot be distorted to mean void before there is a trustee in bankruptcy, for nothing in section 42 carries back the trustee's title to the date of the settlement, because the relation back of the trustee's title applies only to cases of an

[73] *Re Bower Williams* [1927] 1 Ch. 441.
[74] [1893] 2 Q.B. 381.
[75] Bankruptcy Act 1914, s. 37.
[76] *Ibid.* s. 45; see, however, *Re Gunsbourg* [1920] 2 K.B. 426.
[77] [1897] 1 Ch. 776.

original act of bankruptcy. *Re Hart* [78] decides the further point, that a purchaser for value from a donee under a voluntary settlement, without notice of an act of bankruptcy committed by the settlor, is entitled to hold the property as against the trustee in bankruptcy of the settlor, even though the purchase is subsequent to the act of bankruptcy to which the title of the trustee relates back. There is, as it were, a relation back of the title of the purchaser, which prevails over that of the title of the trustee.

In cases where the section defeats the settlement, the property vests in the settlor's trustee in bankruptcy, but he will hold the property subject to any charge created by the settlor for value, or to any paramount title in a third person. In *Sanguinetti* v. *Stuckey's Banking Co.*,[79] it was held that the fact that a voluntary settlement has been set aside under the section does not entitle the trustee to any priority over mortagees and incumbrancers subsequent to the settlement.

vii. Surplus. A voluntary settlement under the section will be void only to the extent necessary to pay the debts in the bankruptcy, and so any surplus of the settled property remaining after payment of the debts and the costs of the bankruptcy will revert to the donee or trustee of the settlement to be held subject to the trusts created by it.[80]

viii. Onus of Proof. The solvency of the settlor is to be tested by evidence, the onus being on those claiming under the settlement to show that when it was executed the settlor could have paid all his debts without the property settled.[81]

ix. Intent. It must be emphasised that the application of section 42 is independent of proof of intent to defraud.

x. Ante-Nuptial Covenants to Settle. Covenants in consideration of marriage, being covenants for valuable consideration, are not caught by Bankruptcy Act 1914, s. 42 (1). It would thus be possible, in the absence of further enactment, for a husband on marriage to covenant to pay an impossibly large sum in favour of his wife and children, and this would enable them to claim in priority to his subsequent creditors.

78 [1912] 3 K.B. 6.
79 [1895] 1 Ch. 176.
80 *Re Parry* [1904] 1 K.B. 129. *Cf. Ideal Bedding Co.* v. *Holland* [1907] 2 Ch. 157, on the same point as regards 13 Eliz. 1, c. 5.
81 *Ex p. Huxtable* (1876) 2 Ch.D. 54; *Re Lowndes* (1887) 18 Q.B.D. 677; *Re Butterworth, ex p. Russell* (1882) 19 Ch.D. 588; *Re Wise, ex p. Mercer* (1886) 17 Q.B.D. 290, 294; *Re H. W. Baker* [1936] Ch. 61.

Section 42 (2) therefore provides that such a covenant is void against the trustee in bankruptcy unless the money was paid or the property transferred in pursuance of the covenant prior to the act of bankruptcy; but that the wife and children may prove in the bankruptcy, being postponed however to other creditors taking for valuable consideration.

Even if the money has been paid or the property transferred in pursuance of such a covenant before the commencement of the bankruptcy, the payment or transfer will be void unless the persons to whom the payment or transfer was made can prove either:

(a) that the payment or transfer was made more than two years before the commencement of the bankruptcy; or

(b) that at the date of the payment or transfer the settlor was able to pay all his debts without the aid of the money so paid or the property so transferred; or

(c) that the payment or transfer was made in pursuance of a covenant or contract to pay or transfer money or property expected to come to the settlor from or on the death of a specified person, and was made within three months after the money or property came into possession or under the control of the settlor.[82]

If such payment or transfer is declared void, the persons to whom it was made can claim in the bankruptcy as if it had not been executed at the commencement of the bankruptcy.[82]

[82] s. 42 (3).

Chapter 15

CHARITABLE TRUSTS

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1. Advantages Enjoyed by Charities

A. Charitable Trusts are Valid as Purpose Trusts

Charitable trusts are purpose trusts. Assets belonging to charitable trusts may either be vested in trustees, who may be individuals or a corporation, or in a corporation [1] the sole object of which is charitable; but in either case it is the nature of the purposes to the

[1] Any corporation is of course constituted to effectuate purposes, but it is not dependent on the law of trusts, charitable or otherwise, for its existence. But *to be a charity* it must be established for charitable purposes only; it may make a profit, but must not be "established" for profit: *National Deposit Friendly Society Trustees* v. *Skegness U.D.C.* [1959] A.C. 293; *Re Resch's W.T.* [1969] 1 A.C. 514, *sub nom. Le Cras* v. *Perpetual Trustee Co.* [1967] 1 All E.R. 915; Tiley, p. 226. Also, it must be wholly outside its powers to distribute assets among its officers, members or anyone else: *Neville Estates Ltd.* v. *Madden* [1962] Ch. 832 at pp. 849–850 and 854 *per* Cross J.

furtherance of which the assets *must* be devoted that gives to the trust the status of a charity.[2] Exceptionally, the beneficiaries of a charitable trust may be a finite number of ascertainable persons, but even so it is the way in which they are benefited that makes such a trust charitable.[3] The general rule in trusts is against the validity of purpose trusts; trusts must ordinarily have ascertainable human beneficiaries.[4] But charitable trusts, being entirely for purposes, are wholly immune from this requirement. Thus the definition of charity is vital, for it enables us to know when a purpose trust may exist.

B. Charitable Trusts may be Perpetual

Charitable trusts may endure for ever and, indeed, the purposes of most of them could never be said to be capable of complete achievement.[5] A gift of income to a charity by way of a perpetual endowment is therefore valid. This rule has further consequences.

> In *Re Levy* [6] a testator directed that his residuary estate should be held by the Official Trustee of Charitable Funds upon trust to pay the income to six named charities in fixed proportions. The charities argued that a perpetual and absolute gift of income gave the right to the capital maintaining that income, a proposition which is undoubtedly true of gifts to individuals. The Court of Appeal held that the proposition did not apply to charities, which can enjoy income in perpetuity in a way that private individuals cannot. The charities were not, therefore entitled to a division of the capital between them; the gift had to remain a perpetual endowment, this having been shown to be the testator's intention.

Charities are only partially exempt, however, from the rule against perpetuities in its strict sense of remoteness of vesting. If a charitable gift is so worded that it may not commence within the perpetuity period, it is caught by the rule [7] and will only be saved if the "wait and see" provisions of the Perpetuities and Accumulations Act 1964 intervene.[8] The only qualification that must be noted is that a gift to charity may be treated as immediate and absolute and so outside the rule, even though the mode of its execution depends on

[2] Hence, a gift to an established charity but upon non-charitable trusts will fail. *Re Spensley's W.T.* [1954] Ch. 233. *Cf. post*, p. 274.
[3] *e.g.*, *Re Scarisbrick* [1951] Ch. 622; Nathan & Marshall, No. 43.
[4] *Ante*, p. 195 *et seq.*
[5] *Re Delius* [1957] Ch. 299; *cf. Re Stemson's W.T.* [1969] 3 W.L.R. 21.
[6] [1960] Ch. 346; *cf. Re Beesty's W.T.* [1966] Ch. 223.
[7] *Chamberlayne* v. *Brockett* (1872) L.R. 8 Ch.App. 206; *Re Mander* [1950] Ch. 547.
[8] s. 3. The Act applies to instruments coming into effect after July 16, 1964.

future and uncertain events.[9] Again, an attempt to shift a gift in certain eventualities from a charity over to individuals or to non-charitable purposes is caught by the rule.[10] But a gift over from one charity to *another charity* is outside the rule. This immunity originated in 1849 with *Christ's Hospital* v. *Grainger*,[11] the unsatisfactory explanation being given that " There is no more perpetuity created by giving to two charities than by giving to one." [12] It is curious, seeing that a gift to charity must otherwise begin within the perpetuity period, that the fact of a prior gift being to another charity can make such a difference. Furthermore, extravagant results follow; for the gift over can be limited so as to take effect on the occurrence of an event wholly unconnected with either charity. In *Re Tyler*,[13] the event that would cause a gift to move from a missionary society to a school (once again Christ's Hospital) was a failure by the former to maintain a family vault in repair, thus enabling a " tomb provision " to endure in perpetuity, or at any rate until it no longer paid the first charity to observe it. Nevertheless, despite constant criticism,[14] the authority of the rule was not questioned before the House of Lords in 1952,[15] and it is left untouched by the Perpetuities and Accumulations Act 1964.

C. Public Interest in Charities

The Attorney-General is charged with the enforcement of charitable trusts. In addition the State maintains, at its own expense, a register of charities and appoints Charity Commissioners to ensure that the community derives the full benefit from charitable gifts.[16] No other form of trust is similarly favoured.

D. Charitable Trusts will not Fail for Uncertainty

This rule is unquestioned, but needs careful explanation. There must be no doubt as to the donor's intention that the property shall be applied to charitable purposes only. There is, however, no need for certainty in the sense of the selection of the particular purpose. The donor may be as vague as he likes on the question of

9 *Chamberlayne* v. *Brockett, supra.*
10 *Re Bowen* [1893] 2 Ch. 491; Nathan & Marshall, No. 55.
11 (1849) 1 Mac. & G. 460; *ante*, p. 202.
12 *Per* Shadwell V.-C. in the court below ((1847) 16 Sim. 83 at p. 100). The explanation confuses vesting with perpetual duration.
13 [1891] 3 Ch. 252. A provision by way of trust for maintaining a tomb in perpetuity is of course void: *Re Dalziel* [1943] Ch. 277, *ante*, p. 202, note 46.
14 Gray, *Rule against Perpetuities* (4th ed.), p. 573; Morris and Leach, pp. 193–194; *Scott on Trusts* (3rd ed.), § 401.5.
15 *Royal College of Surgeons* v. *National Provincial Bank* [1952] A.C. 631.
16 *Post*, p. 278. But only the Attorney-General has a *locus standi* in these matters: *Re Belling* [1967] Ch. 425.

selection, and yet his gift will be devoted to charity. For, where a donor, *having first confined himself to charity*, has failed to specify which particular form of charity is to benefit, a scheme will be directed by the court.

> In *Moggridge* v. *Thackwell*,[17] a testatrix gave her residuary personalty to A, desiring him to dispose of the same to such charities as he shall think fit, and recommending clergymen who have large families and good character. After long litigation lasting some 15 years, the House of Lords held that the testatrix's intention was that the property should be applied to charity. It was immaterial that she had not specified particular charitable objects, and that the trustee had predeceased the testatrix. The next-of-kin were excluded; and the court settled a scheme for the disposition of the estate.

Where no trust has been created, but only a general intention expressed that property should go to charity, the court has no jurisdiction. In such a case the Crown disposes of the gifts by sign manual.[18] But the Crown acts on principles very similar to those by which the court is governed.

But neither the Crown nor the court will intervene if the donor has expressed himself too diffusely. It must be clear that the gift is for purposes which are exclusively charitable. If there is a latitude to devote the assets to non-charitable purposes, the whole gift will fail. A scheme to operate by way of severing invalid non-charitable purposes is not possible; such a scheme would validate the invalid, not regulate the valid.[19]

A trust for a chosen object so vague that the court would be unable to enforce or administer it is also void; uncertainty in this sense is fatal.[20]

E. Fiscal Privileges

The substantial immunities of charities from taxation are said to be justified by the benefits they provide to the community at large. United Kingdom charities do not pay income tax on rents, interest, dividends or annual payments received by them as charities, and may also be exempt from tax on the profits of trades carried on by

[17] (1792) 1 Ves.Jr. 464; (1803) 7 Ves.Jr. 36; (1807) 13 Ves.Jr. 416. See also *Mills* v. *Farmer* (1815) 1 Mer. 55 and *cf. Re Willis* [1921] 1 Ch. 44 (power to appoint to charity given to a person who predeceased the testator).
[18] *Re Smith* [1932] 1 Ch. 53; *Re Pyne* [1903] 1 Ch. 83; *Re Bennett* [1960] Ch. 18.
[19] *Chichester Diocesan Fund* v. *Simpson* [1944] A.C. 341; Nathan & Marshall, No. 51. But see *post*, p. 276.
[20] *Re Hummeltenberg* [1923] 1 Ch. 237; Nathan & Marshall, No. 32.

them.[21] Gifts to charities made more than one year before the death of a testator are wholly exempt from estate duty, an exemption requiring seven years in the case of non-charitable gifts.[22] Transfers to charities carry only half the normal stamp duty[23]; there is immunity, in effect, from Selective Employment Tax,[24] substantial relief from rating,[25] and partial relief from the provisions of the Land Commission Act.[26] It is impossible to go into the details of these exemptions,[27] but it must not be assumed that exemptions are restricted to charities; rating relief, for example, is available for organisations concerned with "social welfare."

The consequences of the notion of "charity" being used as the basis of fiscal privileges have been far-reaching. At one time, it used to be said that Equity leant in favour of charity,[28] an ambiguity might be resolved in its favour for instance. It would be most unwise to rely too strongly on such a maxim now. It was conceived at a time when the definition of charity was considered mainly in the context of validating perpetual purpose trusts; now that fiscal exemptions have acquired such importance, a much stricter view has prevailed.[29] It is, in fact, unfortunate that charity is trying to serve two masters. A strict view of a fiscal privilege is entirely warranted; but as a result of applying it, many purpose trusts which, although not of a character entitling them to fiscal privileges, might nevertheless be allowed to subsist as private trusts have to fail.[30] It can be argued that two tests, not one, are called for. Furthermore, uncertainty is caused if doubts are cast on earlier decisions dating from a time when a lenient view of charity prevailed. In recent years trustees have, on claiming a fiscal immunity, found that the trust they had been administering as charitable, perhaps for many years, was not charitable and therefore void. Remedial legislation and the indemnity provisions of section 61 of the Trustee Act 1925 have had

21 I.T.A. 1952, ss. 447, 448. *Cf.* note 1, *ante*, p. 252. For a recent and difficult example involving sale of goods made by the blind, see *Association for Industrious Blind* v. *Commissioner for Valuation* [1968] N.I. 21.

22 F.A. 1909–10, s. 59 (1); F.A. 1946, s. 47; F.A. 1968, s. 35; *ante*, p. 185.

23 F.A. 1958, s. 34 (6).

24 Selective Employment Payments Act 1966, s. 5.

25 Rating and Valuation (Misc. Provisions) Act 1955, s. 8 (1) (*a*); Rating and Valuation Act 1961, s. 11.

26 Land Commission Act 1967, s. 57.

27 See generally Wheatcroft, *Taxation of Gifts and Settlements*, and (on rating) "Social Welfare" (1959) 23 Conv.(N.S.) 365 (D. W. M. Waters).

28 *e.g.*, Lord Loreburn L.C. in *Weir* v. *Crum-Brown* [1908] A.C. 162 at p. 167. It is sometimes echoed; see *per* Lord Simonds in *Hadaway* v. *Hadaway* [1955] 1 W.L.R. 16 at p. 19, but the echo is rather faint.

29 See *per* Viscount Simonds in *Oppenheim* v. *Tobacco Securities Trust Ltd.* [1951] A.C. 297 at p. 307; *I.R.C.* v. *Baddeley* [1955] A.C. 572 at p. 583; and *per* Lord Upjohn in *Scottish Burial Reform and Cremation Society* v. *Glasgow Corporation* [1968] A.C. 138 at p. 153.

30 See 72 L.Q.R. 187 (G. Cross), especially at p. 203 *et seq.*; *ante*, p. 200. But the impact of *Re Denley's Trust Deed* [1969] 1 Ch. 373 on this dichotomy may be considerable.

to be resorted to in order to save the situation.[31] For these and other reasons, no pride can be taken in the present law relating to the definition of a charity. Nevertheless, it is to this issue that we must now turn.

2. The Definition of Charity

During the reign of Elizabeth I, many abuses were found to exist in the administration of charitable funds. To remedy these abuses there was passed, in 1601, the Statute of Charitable Uses. The Statute contained no definition of charity, but in its Preamble a large number of instances were given of what were then considered to be charitable purposes. These instances were seized on by the courts as indicating the legal range of charity. Instances specifically referred to were admitted without question, while gifts not specifically referred to were held to be charitable if they were within the Preamble's "spirit and intendment." As the centuries passed it was, of course, the latter process that gained predominance, and hence it is to the decisions of courts enshrining it that we must turn for guidance on the law. This is even more true since 1960, when the Preamble finally vanished from the Statute Book.[32] We now have nothing but the decided cases on which to base ourselves. Fortunately, in 1891, Lord Macnaghten had attempted a classification of the cases which has since won acceptance.[33] Indeed, the Nathan Committee, in discussing this vexed question, was content to suggest merely that Lord Macnaghten's classification should be given statutory authority.[34] The classification was into 1. Trusts for the Relief of Poverty; 2. Trusts for the Advancement of Education; 3. Trusts for the Advancement of Religion; 4. Trusts for Other Purposes Beneficial to the Community not falling under any of the preceding heads. Before discussing each of these heads, a few preliminary points must be made.

A. Preliminary Points

First, the classification is not water-tight; a scholarship for research in theology would be valid under head 2 or head 3 for

[31] *e.g.*, *National Anti-Vivisection Society* v. *I.R.C.* [1948] A.C. 31; Nathan & Marshall, No. 49; *Re Wightwick's W.T.* [1950] Ch. 260; *I.R.C.* v. *Baddeley*, *supra*; Recreational Charities Act 1958; *Ellis* v. *I.R.C.* (1949) 31 T.C. 178; Charitable Trusts (Validation) Act 1954; Charities Act 1960, s. 14.

[32] Charities Act 1960, s. 38.

[33] *Comm. of Income Tax* v. *Pemsel* [1891] A.C. 531 at p. 583. The classification was not original for it was forestalled by Romilly's arguments in *Morice* v. *Bishop of Durham* (1804) 9 Ves.Jr. 399; (1805) 10 Ves.Jr. 522; Nathan & Marshall, No. 26.

[34] Cmd. 8710, Chap. 3. The suggestion has not been implemented, and it is more than doubtful now if the change would be more than a formal one.

instance. Secondly, not all trusts for purposes beneficial to the community are charitable; but only those that are beneficial "in a way that the law regards as charitable."[35] Thirdly, each head involves two elements; an element of benefit, *e.g.*, the advancement of education; and an element of *public* benefit, *i.e.*, education being advanced in a way that will benefit the whole community, or a sufficiently substantial part of it. This requirement of *public* benefit varies from head to head. Fourthly, a trust will not fail to be charitable because it may in its operation incidentally benefit the rich, or other non-objects of a charity.[36] But if a non-charitable purpose is an object, the trust cannot be charitable, for then it ceases to be wholly and exclusively "for charitable purposes."[37]

B. Trusts for the Advancement of Education

i. What is Education? Education can take many forms. Schools and universities are obvious examples, but education of a less academic sort is not excluded. Business management is included,[38] and so is education in the art of government.[39] But *Re Shaw's Will Trusts*,[40] providing for "a sort of finishing school for the Irish people," goes perhaps beyond what the law should countenance. Satellite purposes are also regarded not unfavourably.

> In *Re Mariette*,[41] a gift to further sport in a boarding school was upheld, and though Eve J. placed some reliance on it being a boarding school, the merits of physical education in any school and presumably also in a university are now sufficiently well recognised to permit of its admission as charitable in these contexts. There are, in fact, very few aspects of the education of the young that would not be regarded as charitable.[42]

Nor is education confined to the directly inculcative; in *Royal Choral Society* v. *I.R.C.*,[43] Lord Greene M.R. said, speaking of the view that education meant a master teaching a class, "I protest against that narrow conception of education when one is dealing

35 *Per* Lord Simonds in *Williams' Trustees* v. *I.R.C.* [1947] A.C. 447 at p. 455; Nathan & Marshall, No. 50; *post*, p. 267. *Cf.* Charities Act 1960, s. 38 (4).
36 *Verge* v. *Somerville* [1924] A.C. 496; *Re Resch's W.T.* [1969] 1 A.C. 514; *sub nom. Le Cras* v. *Perpetual Trustee Co.* [1967] 1 All E.R. 915; Tiley, p. 226. *Cf. Re Eighmie* [1935] Ch. 524.
37 *Ellis* v. *I.R.C.* (1949) 31 T.C. 178; *Re Cole* [1958] Ch. 877.
38 *Re Koettgen's W.T.* [1954] Ch. 252.
39 *Re McDougall* [1957] 1 W.L.R. 81. *Cf.* political trusts, *post*, p. 269.
40 [1952] Ch. 163. This was Mrs. G. B. Shaw's will.
41 [1915] 2 Ch. 284. For sport outside the world of education, see *post*, p. 267.
42 *Re Webber* [1954] 1 W.L.R. 1500 (Boy Scouts Association); *Re Mellody* [1918] 1 Ch. 228 (school treat); *Re Dupree's Deed Trusts* [1945] Ch. 16 (chess for males in Portsmouth under 21; but *quaere* in the case of bridge or whist).
43 [1943] 2 All E.R. 101 at p. 104, holding the Society to be charitable.

with aesthetic education. In my opinion, a body of persons established for the purpose of raising the artistic state of the country . . . is established for educational purposes." The courts sometimes have to deal directly with aesthetic issues.

> In *Re Delius* [44] there was a gift to increase general appreciation of the musical works of Delius. Roxburgh J. had no doubt that the trust was charitable, even though it existed to further a particular composer, but he recognised that there would be difficulty if a manifestly inadequate composer was chosen.[45]

As with music, so with the visual arts.

> In *Re Pinion* [46] a testator gave his studio, together with its contents, to trustees to enable it to be used as a museum for the display of his collection, which included paintings executed by the testator himself. The court felt bound to consider whether, on the evidence, the proposed museum had any worthwhile educational value; it came to the conclusion that it had not, and that the gift was void.

There must be an intention that learning should be imparted or be accessible, and not merely accumulated. In *Re Hopkins*,[47] Wilberforce J. said "In order to be charitable, research must either be of educational value to the researcher, or must be so directed as to lead to something which will pass into the store of educational material, or so as to improve the sum of communicable knowledge in an area which education may cover." Research of a purely private character is thus excluded, as is research on an absolutely useless subject; but it was held in this case that a search for the "Bacon-Shakespeare manuscripts" did not fall into the latter category.

ii. Public Benefit. It is at this point that the notions of "education" and "*public*" benefit mingle. The latter notion needs separate discussion, however. To begin with, a trust to educate one's own children is not charitable; it is educational, but it is not sufficiently "public." The same is true of a trust to educate one's relations.[48] Relations are neither the whole community nor a sufficient section of it. This rule was affirmed by the Court of Appeal

[44] [1957] Ch. 299.
[45] The proposition that all religions, irrespective of merit, are charitable, *post*, p. 261, is not applied by analogy to art!
[46] [1965] Ch. 85. *Cf. National Anti-Vivisection Society* v. *I.R.C.* [1948] A.C. 31 at p. 42, *per* Lord Wright; Nathan & Marshall, No. 49.
[47] [1965] Ch. 669. This definition is to be preferred to the remarks of Harman J. in *Re Shaw* [1957] 1 W.L.R. 729 at pp. 737–738; Nathan & Marshall, No. 29, on the same subject which attach too much importance to direct teaching.
[48] In *Caffoor Trustees* v. *Comm. of Income Tax, Colombo* [1961] A.C. 584, "Founder's Kin" provisions were discussed and held to belong "more to

in 1945 in *Re Compton*,[49] a case from which stems a rule of great importance—*the rule of no personal nexus.* Generally speaking, what is or is not a sufficient section of the community to constitute the necessary public element can only be ascertained by looking at the facts of each particular case. A sect is a sufficient section, a locality is a sufficient section; a sect in a locality is a sufficient section for religious trusts,[50] but different views have been expressed about this under the fourth head[51]; a community, *e.g.*, "Welsh people," will be a sufficient section only if it is identifiable as a section; and so on. There is no easy path to a determination of these issues. But in *Re Compton*,[49] Lord Greene M.R. drew a distinction between a group of people identified by virtue of their character as individuals, and a group of people identified by virtue of membership of a class. An example of the latter would be the inhabitants of a parish; the common quality which identifies them is impersonal. Thus they are a section of the community. An example of the former would be the children or employees of a particular person; the common quality is personal. They are not a sufficient section of the community. This rule was approved and extended by the House of Lords in *Oppenheim* v. *Tobacco Securities Trust Co. Ltd.*[52]:

A trust was set up to provide for the education of children of employees or former employees of a company or any of its subsidiary or allied companies. The number of such employees was at least 110,000. Nevertheless, the House of Lords held the trust to be void[53] on the ground that the beneficiaries were defined by relation to a particular individual, namely, the company. Lord MacDermott dissented,[54] holding that a personal nexus rule was likely to create confusion and doubt. He pointed out that there is no difference between the class "railway men" (supposedly a sufficient "section" of the community) and those "employed by a railway company," and that civil

history than to doctrine." The Privy Council recognised that a founder's family was not to be excluded from participation in an educational charity, and might possibly enjoy some kind of preference in the selection; *per* Lord Radcliffe at pp. 602–603. But such a privilege must not constitute a priority over the community generally. Closed scholarships must also be regarded as an anomalous but valid method of effectuating a charitable purpose; see *Re Compton* [1945] Ch. 123 at pp. 132–134.

49 [1945] Ch. 123. An unsuccessful attempt was made in *Re Compton* [1946] 1 All E.R. 117 to get this trust upheld as a private trust. It failed, although the individuals to benefit were ascertained, because it was a perpetual purpose trust.

50 *Neville Estates* v. *Madden* [1962] Ch. 832.

51 *I.R.C.* v. *Baddeley* [1955] A.C. 572; contrary views, not part of the ratio, were expressed by Viscount Simonds and Lord Reid.

52 [1951] A.C. 297.

53 See *Re Denley's Trust Deed* [1969] 1 Ch. 373 for a possible method of establishing a private trust in this type of case, but lacking fiscal privileges.

54 [1951] A.C. 297, especially at pp. 317–319.

servants and soldiers are all, in a sense, in "common employment." He took the view that in such cases, as in every other case, the issue was one of fact and not of law. But the courts have consistently approved the rule, which must now be regarded as firmly established, whatever its difficulties.[55]

At the other end of the scale, a trust will be held not charitable if it is for "a fluctuating body of private individuals."[56] A section of the community must have some coherence. In *Davies* v. *Perpetual Trustee Co.*,[57] there was a trust for "Presbyterians the descendants of those settled in the Colony hailing from or born in the North of Ireland." The purpose of the trust was educational, but those to benefit were defined too capriciously, and the gift failed. There is some limit to the rule that a charitable trust will not fail for uncertainty.[58]

Clearly, the task of the draftsman in steering clear of these various obstacles is a formidable one. It is not easy to be sure in advance of what constitutes a "section" of the community.

C. Trusts for the Advancement of Religion

i. Religious Toleration. In religious toleration equity lagged behind the criminal law.[59] For some decades after it ceased to be a criminal offence to hold and propagate certain religious beliefs or to deny all beliefs, equity would prevent a trust for such purposes from being carried out at all. But the ban on heterodoxy was fully removed early this century by two decisions of the House of Lords, *Bowman* v. *Secular Society*[60] and *Bourne* v. *Keane*.[61] But it is one thing to uphold as lawful gifts for such purposes, and another to endow trusts for such purposes with the privileges belonging to charities. Yet in every direction progress has been made towards universal toleration.

Within the pale of religion, shades of doctrine are immaterial.

[55] In *Davies* v. *Perpetual Trustee Co.* [1959] A.C. 439 at p. 456 the rule was considered applicable to a trust for descendants of a substantial number of individuals. In *Re Mead's Trust Deed* [1961] 1 W.L.R. 1244 it was applied to members of a trade union, Cross J. finding no material difference between a trade union and a company trust for this purpose.

[56] *Per* Lord Wrenbury in *Verge* v. *Somerville* [1924] A.C. 496 at p. 499.

[57] [1959] A.C. 439, allowing an appeal from a decision of the Supreme Court of New South Wales in 1919—a life interest having intervened.

[58] *Cf. Williams Trustees* v. *I.R.C.* [1947] A.C. 447 at pp. 457–458; Nathan & Marshall, No. 50, *ante*, p. 254.

[59] See Holdsworth, *H.E.L.*, viii, pp. 402–420; (1931) 45 L.Q.R. 293 at p. 305 (Sir F. Pollock); (1946) 62 L.Q.R. 234–235 (F. H. Newark). See generally Crowther, *Religious Trusts*.

[60] [1917] A.C. 406.

[61] [1919] A.C. 815.

In *Thornton* v. *Howe*,[62] as early as 1862, a high water-mark of toleration was reached, Romilly M.R. holding to be charitable a trust for the publication of the sacred writings of Joanna Southcott.[63] Though he was at no pains to disguise the fact that he thought the doctrines therein contained to be ridiculous, he nevertheless concluded that they were of a religious nature. And the privilege of charity is not, of course, confined to Christianity. As Cross J. once remarked, "as between different religions the law stands neutral, but it assumes that any religion is at least likely to be better than none."[64] But as with education, so with religion, there are limits. Thus the Agapemonites failed to qualify.[65] Nor is every moral philosophy a religion. The constitutional possession of religious doctrine by a society is not sufficient in itself to make that society charitable; there must be the intention to *advance* religion in some positive manner. On this ground both Masonry and Theosophy have failed to qualify.[66] Again, "doctrines adverse to the very foundations of all religion"[67] cannot found a charity. It is difficult to see how a gift to propagate arguments calculated to disprove, no matter in how sober a manner, all religious beliefs, could be upheld as a trust for the advancement of religion. Such a trust might, however, be brought within another head of charity; for instance rationalism as well as moral philosophy might, in certain circumstances, be educational.[68]

The doctrines of a particular faith are not accepted as such. This issue was crucial in *Gilmour* v. *Coats*,[69] a case concerning a community of cloistered nuns who devoted their lives to prayer within their convent and engaged in no exterior works. Was it possible to show benefit to the public. The doctrine of the Roman Catholic Church is to the effect that everyone benefited from such devotional activities but the House of Lords held that proof of

62 (1862) 31 Beav. 14. As this gift was to take effect out of land, it was void as infringing the Statutes of Mortmain, now repealed.

63 See *Edinburgh Review*, Vol. 24, p. 452. Her adherents are active to this day.

64 In *Neville Estates* v. *Madden* [1962] Ch. 832 at p. 853 (synagogue).

65 *Re Fysh, The Times*, July 1, 1957 ("Church" of the Agapemonites held not to be a religious institution); see, on the Agapemonites, *Nottidge* v. *Prince* (1860) 2 Giff. 246.

66 *United Grand Lodge of Ancient Free and Accepted Masons of England* v. *Holborn B.C.* [1957] 1 W.L.R. 1080, especially *per* Donovan J. at p. 1090; *Berry* v. *St. Marylebone B.C.* [1958] Ch. 406. The same principle applies to education, and probably generally. *Cf. National Deposit Friendly Society Trustees* v. *Skegness U.D.C.* [1959] A.C. 293 at p. 322, *per* Lord Denning.

67 *Per* Romilly M.R. (1862) 31 Beav. 14 at p. 20.

68 See the approach of Cohen J. to a philosophic question in *Re Price* [1943] Ch. 422; and *cf. Re Stemson's W.T.* [1969] 3 W.L.R. 21 at p. 23.

69 [1949] A.C. 426; Nathan & Marshall, No. 47. This decision should not be extended to affect rest and recuperative homes. *Cf. Re Banfield* [1968] 1 W.L.R. 846 and *Re White's W.T.* [1951] 1 All E.R. 528 with *Re Warre's W.T.* [1953] 1 W.L.R. 725, an unsatisfactory decision.

public benefit was necessary to constitute a charity; and that benefit to the public was not proved by doctrine alone. The community was held non-charitable.

ii. Public Benefit. *Gilmour* v. *Coats* [69] thus raises the issue of benefit to the *public*. Professor Newark [70] earlier argued that religious charities should be exempt from this requirement, but *Gilmour* v. *Coats* [69] is direct authority that it is required. Neither religious doctrine, nor edification by example, nor the eligibility of all Roman Catholic women to enter the convent were sufficient to satisfy it. In *Neville Estates* v. *Madden* [71] however, Cross J. showed that the crux of *Gilmour* v. *Coats* [69] was the nuns' seclusion from the world. Trusts for those who go out into the world are in a different category; and so are trusts for public worship. It is probably on this latter ground that the decision of Luxmoore J. in *Re Caus* [72] holding gifts for masses to be charitable would now be followed.

iii. Satellite Purposes. It must be added, finally, that "satellite" purposes have been admitted freely in the realm of religious charity. A trust for any part of the fabric of a church building is charitable, and this includes a tomb,[73] bells [74] or a window.[75] A trust for a graveyard [76] (even one restricted to a comparatively small community) is charitable, but not a trust for individual tombs in a graveyard.[77] A trust for a church choir is charitable [78] and so is any form of church mission work, including a trust for the benefit of retired missionaries.[79]

D. Trusts for the Relief of Poverty

i. Meaning of Poverty. Poverty is not destitution. A gift for "ladies of limited means" [80] is charitable; and it does not matter

[70] (1946) 62 L.Q.R. 234, basing himself on a group of Irish cases which must now be regarded as without authority in the United Kingdom. See further on Irish divergences Delany, *Law of Charities in Ireland.*

[71] [1962] Ch. 832. But does the *Compton-Oppenheim* rule apply to religious charities? If so, a church provided for the benefit of employees of a company would not be charitable unless others were allowed into the services. But this submission is not consistent with the reasoning of Cross J. in this case at p. 853. See also the remarks of Lord Reid in *I.R.C.* v. *Baddeley* [1955] A.C. 572 at p. 606.

[72] [1934] Ch. 162.

[73] *Hoare* v. *Osborne* (1866) L.R. 1 Eq. 585; *Re Vaughan* (1886) 33 Ch.D. 187.

[74] *Re Pardoe* [1906] 2 Ch. 184; an extreme case as the purpose was to commemorate the restoration of the monarchy.

[75] *Re King* [1923] 1 Ch. 243.

[76] *Re Manser* [1905] 1 Ch. 68; *Re Eighmie* [1935] Ch. 524. This may be so independent of religion; thus a non-profit-making cremation society is charitable. *Scottish Burial Reform and Cremation Society* v. *Glasgow Corporation* [1968] A.C. 138.

[77] *Lloyd* v. *Lloyd* (1852) 2 Sim.(N.S.) 225.

[78] *Re Royce* [1940] Ch. 514.

[79] *Re Mylne* [1941] Ch. 204; *Re Moon's W.T.* [1948] 1 All E.R. 300.

[80] *Re Gardom* [1914] 1 Ch. 662.

that the gift is limited to those who have some basic income.[81] But despite some dicta which suggest that "the class from which they have come"[82] and "their status in life"[83] are relevant, it must be doubted whether a trust to provide comfortable circumstances for those who are used to them is charitable. "Needy" is not the same thing as "used to comfort."

The desire to relieve poverty may be inferred from the circumstances of the gift, for instance the provision in 1871 of a soup-kitchen,[84] or from the construction of the trust instrument.[85] There are many cases dealing with this last point; they all turn on the individual instrument and it is impossible to generalise on them, but it may perhaps be pointed out that gifts to the "working classes"[86] or for the benefit of employees of a company[87] are now unlikely to be held charitable unless the qualification of poverty is clearly stated.

ii. Public Benefit. The requirement of *public* benefit has been reduced, in the field of poverty, almost to vanishing point. It is still true to say that a gift to a group of individuals chosen because they are poor is not charitable, but a gift to the poor members of a class is charitable, provided the object of the gift is to relieve their poverty.[88] That the rule has to be stated so widely, is due to the "Poor Relations" cases,[89] holding gifts to one's own poor relations as a class to be charitable. Accordingly, the *Compton-Oppenheim* rule does not apply to cases of poverty.[90] The House of Lords[91] has specifically reserved the issue of the non-application of this rule to *company* trusts for the relief of poverty, but the poor relations cases, as such, will probably not be overruled but will be allowed to constitute an anomalous exception. They will not be extended. In *Re Compton*,[92] the Court of Appeal refused to extend

81 *Re De Carteret* [1933] Ch. 103 ("not less than 80 or more than 120 pounds per annum").
82 *Per* Maugham J. in *Re De Carteret* [1933] Ch. 103 at p. 112.
83 *Per* Evershed M.R. in *Re Coulthurst's W.T.* [1951] Ch. 661 at p. 666.
84 *Biscoe* v. *Jackson* (1887) 35 Ch.D. 460.
85 *Re Coulthurst's W.T.* [1951] Ch. 193 and *Re Cottam* [1955] 1 W.L.R. 1299 are recent examples. *Cf. Re Tree* [1945] Ch. 325.
86 *Re Sanders' W.T.* [1954] Ch. 265.
87 *Re Drummond* [1914] 2 Ch. 90; *Re Hobourn Aero Components Air Distress Fund* [1946] Ch. 194; distinguished in *Gibson* v. *South American Stores* [1950] Ch. 177.
88 In *I.R.C.* v. *Baddeley* [1953] 1 W.L.R. 84 at p. 88, Harman J. pointed out that to amuse the poor would not be to relieve them; affirmed in the House of Lords [1955] A.C. 572 at p. 585.
89 They are commonly said to derive from *Isaac* v. *Defriez* (1754) Amb. 595, but the purport of them was familiar to Lord Hardwicke in *Att.-Gen.* v. *Bucknall* (1742) 2 Atk. 328. They are discussed at length in *Re Compton* [1945] Ch. 123 and *Re Scarisbrick* [1951] Ch. 622; Nathan & Marshall, No. 43.
90 *Gibson* v. *South American Stores* [1950] Ch. 177, a company trust.
91 *Oppenheim* v. *Tobacco Securities Trust* [1951] A.C. 297 at p. 308, 313; *Re Cox* [1955] A.C. 627 at p. 637 (P.C.).
92 [1945] Ch. 123.

them to a trust for the education of poor relations. It was held in *Re Scarisbrick*,[93] however, that they covered a trust for immediate distribution as well as an endowment trust.

E. Trusts for Other Purposes Beneficial to the Community

It has already been said that "beneficial" means "beneficial in a way that the law regards as charitable." But the inspirations of donors are infinitely variegated, and it is impossible to be precise about "beneficial" in any form. Nevertheless, it is a test of the legal status of charity and has to be approached objectively. Two main points can be made. First, what the donor thought, or what other people think, is not the issue; "beneficial to the community" is something that has to be decided by the court in the light of all the relevant evidence available.

> In *National Anti-Vivisection Society* v. *I.R.C.*,[94] the charitable status of a society having as its object the total suppression of vivisection was in issue. In 1895, in *Re Foveaux*,[95] Chitty J. had held the society to be charitable, taking the view that the court stood neutral on the question of whether the prohibition of vivisection would, in fact, benefit the community. The House of Lords in 1947 overruled *Re Foveaux*, disapproved of its reasoning, and held the society non-charitable. The intentions of donors and founders were irrelevant,[96] and the court, whatever the difficulties, had to decide the issue of benefit, if necessary "weighing conflicting moral and material utilities."[97]

The onus is on those who allege the existence of a charity, and, in marginal cases, the absence of evidence from which the courts can infer benefit to the public will be fatal,[98] but in *Scottish Burial Reform and Cremation Society* v. *Glasgow Corporation*,[99] the House of Lords, in holding a non-profit-making cremation society to be charitable, affirmed that the courts could act on known general considerations.

Once it is accepted that good intentions are insufficient to turn the non-charitable into the charitable—and this is now accepted—the need to decide the issue on the basis of a value judgment seems

[93] [1951] Ch. 622; Nathan & Marshall, No. 43.
[94] [1948] A.C. 31; Nathan & Marshall, No. 49.
[95] [1895] 2 Ch. 501.
[96] Following the decision of Russell J. in *Re Hummeltenberg* [1923] 1 Ch. 237; Nathan & Marshall, No. 32; and not following the Irish Court of Appeal in *Re Cranston* [1898] 1 Ir.R. 431.
[97] *Per* Lord Wright [1948] A.C. 31 at pp. 47–49. Harman J. appears, in *Re Shaw* [1957] 1 W.L.R. 729 at p. 740 to be evading this task; Nathan & Marshall, No. 29.
[98] *e.g.*, *Re Pinion* [1965] Ch. 85.
[99] [1968] A.C. 138. *Re Resch's W.T.* [1969] 1 A.C. 514.

inevitable. But is it? The American *Restatement*[1] sees nothing improper in trusts for both armament and disarmament and, by parity of reasoning, vivisection and anti-vivisection being charitable. There is much to be said for the American view. "Benefit to the community" is hardly a legal issue at all. There is only the negative principle that "not every object of public utility must necessarily be a charity,"[2] and after that, the issue is scarcely one of fact; and certainly not one of which the courts are necessarily the best judges.

Which leads to the second main point to be made under this section. The courts still start from the premise that the legal test of charity is governed by the spirit and intendment of the Preamble. But in practice they work by analogy from cases that have already developed the law in radical manner. Thus in *Scottish Burial Reform and Cremation Soc.* v. *Glasgow Corporation*,[3] a non-profit-making society was held charitable by analogy with cases holding burial grounds to be so, though neither facility receives specific mention in the Preamble itself.

But since the obligation placed by the Charities Act 1960 upon charities to register with the Charity Commission,[4] a further and most beneficial development has taken place. For, as part of their jurisdiction to register or to refuse registration, the Commissioners have built up a valuable range of precedents by which they can be guided, and though this has had to be based on the existing case law, nevertheless the Commissioners feel that they can develop from it "such a concept of the field of charity as may meet the needs of the community."[5] The process of developing the notion of "benefit to the community" is thus far more in the hands of experts than hitherto, and there have been very few appeals from the Commissioners to the court.

The number of cases decided under the fourth head is enormous, and classification of them is not practicable in a work of this size.[6] The following illustrations are only of particular difficulties. It must also be remembered that under the fourth head an element of "public" as well as "benefit" is required and that the *Compton-Oppenheim* rule applies.

i. Social and Recreational Trusts. It is hardly possible to make a division between these two types, as donors often have both objects in mind.

1 *Restatement of the Law of Trusts*, § 374, comment *l*.
2 *Per* Lindley L.J. in *Re Macduff* [1896] 2 Ch. 451 at p. 466.
3 [1968] A.C. 138; *ante*, p. 256.
4 *Post*, p. 278. The annual reports contain much useful guidance.
5 Report of the Commissioners for 1966, paras. 27–41.
6 The authoritative work is *Tudor on Charities* (6th ed.), 1967.

The chart of decisions on sport is erratic.[7] Until 1953 it was possible to say that, while a gift for sport simply is not charitable,[8] it becomes so if it is for sport in a school,[9] or in the army.[10] But in 1953 *I.R.C.* v. *Glasgow City Police Athletic Assn.*[11] came before the House of Lords. The case originated in a claim for the police athletic association to exemption from income tax. The chief purpose of the association was the increase, through the improved physique of its members, of the efficiency of a body whose health is of especial moment to the community. But another purpose, purely recreational, could not be dismissed as merely ancillary; recreation for the police was not charitable, and exemption was refused.

The extent of the impact of this decision upon earlier cases is doubtful. It is arguable that *Re Mariette*[12] can be saved only if it can be construed as an educational gift. *Re Gray*,[13] on the other hand, may be saved on the ground that the efficiency of the services is of prime concern to the community, as is shown by the admission, in *Re Corbyn*[14] of a bequest for training boys as officers in the Navy or Mercantile Marine.

Williams' Trustees v. *I.R.C.*[15] illustrates how, in the sphere of trusts containing a social or recreational element, perfectly praiseworthy objects fail to gain admission as charitable objects.

A trust was established with the object of promoting Welsh interests in London by various means, most of which were charitable; but the House of Lords held that the "social" element loomed too large and prevented the trust as a whole from being charitable.

The matter was taken further in *I.R.C.* v. *Baddeley*,[16] where there was a trust for the promotion of the religious, social and physical well-being of persons resident in West Ham and Leyton who were members or potential members of the Methodist Church. Again, the "social" element proved fatal. It was expressly said, however, that a recreation ground may be a charitable object, so long as the class of people to enjoy it is not too narrow.[17]

[7] See (1956) 9 *Current Legal Problems* 39 (O. R. Marshall).
[8] *Re Nottage* [1895] 2 Ch. 649.
[9] *Re Mariette* [1915] 2 Ch. 284; Nathan & Marshall, No. 45.
[10] *Re Gray* [1925] Ch. 362.
[11] [1953] A.C. 380. *Cf. Re Denley's Trust Deed* [1969] Ch. 373.
[12] See note 9, *supra*.
[13] [1925] Ch. 362.
[14] [1941] Ch. 400.
[15] [1947] A.C. 447; Nathan & Marshall, No. 50.
[16] [1955] A.C. 572, Lord Reid dissenting.
[17] *Per* Viscount Simonds at p. 589; followed in *Re Morgan* [1955] 1 W.L.R. 738.

The uncertainty caused by the presence of "social benefit" led to the Recreational Charities Act 1958. The Act treats miners' welfare trusts separately [18] and then provides, in section 1, as follows:

> 1.—(1) Subject to the provisions of this Act, it shall be and be deemed always to have been charitable to provide, or assist in the provision of, facilities for recreation or other leisure-time occupation, if the facilities are provided in the interests of social welfare:
>
> Provided that nothing in this section shall be taken to derogate from the principle that a trust or institution to be charitable must be for the public benefit.
>
> (2) The requirement of the foregoing subsection that the facilities are provided in the interests of social welfare shall not be treated as satisfied unless—
>
> (*a*) the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended; and
>
> (*b*) either—
>
> (i) those persons have need of such facilities as aforesaid by reason of their youth, age, infirmity or disablement, poverty or social and economic circumstances; or
>
> (ii) the facilities are to be available to the members or female members of the public at large.
>
> (3) Subject to the said requirement, subsection (1) of this section applies in particular to the provision of facilities at village halls, community centres and women's institutes, and to the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation, and extends to the provision of facilities for those purposes by the organising of any activity.

This introduces some baffling difficulties.[19] The proviso to subsection (1) must be intended to reserve the issue of *public* benefit, *i.e.*, whether Methodists in West Ham and Leyton are a section of the community.[20] But in subsection (2), "social welfare" [21] is

[18] s. 2, a wholly retrospective section.

[19] See the discussion by Ungoed-Thomas J. in *Wynn* v. *Skegness U.D.C.* [1967] 1 W.L.R. 52 at pp. 63–64.

[20] A matter on which Viscount Simonds and Lord Reid differed. The matter is not finally decided. It would be a sufficient section for a purely religious trust.

[21] Since it is so defined, it is necessary to keep wholly apart the definition of "social welfare" in the Rating Acts. In that context "all that the court has to do is to forget all the refinements of charity law"; *per* Viscount Simonds in *Skegness U.D.C.* v. *Derbyshire Miners' Welfare Committee* [1959] A.C. 807 at p. 824.

itself defined in a way that involves the groups that are to benefit. The effect of this Act on the cases may be most capricious. For instance, "Welsh people" do not appear to come within (2) (*b*) (i), in which case *Williams' Trustees* v. *I.R.C.*[22] is unaffected; similarly with *I.R.C.* v. *Baddeley*,[23] it is not clear that "Methodists" are included anywhere under the subsection. Parliament, having determined to be bold, appears to have been overcome by a fit of caution. It is even debatable whether the *Glasgow Police* case[24] would now be decided differently; are the police covered by "youth" or by "social and economic circumstances"?

ii. Gifts for Animals. The decision of the House of Lords in *National Anti-Vivisection Society* v. *I.R.C.*[25] was based on two grounds. First that the main object of the Society was political in that its objectives required an alteration in the law[26]; and second that the material benefits, both to mankind and to animals themselves, gained by vivisection, must outweigh the problematical benefits of a moral elevation which might be gained by a campaign for its abolition.

How does this decision affect the rule, previously well understood, that gifts for the welfare of animals in general,[27] or a class of animals, as opposed to gifts for specific animals,[28] are charitable? The grounds of the validity of such gifts for the welfare of animals have been differently stated in England and in Ireland. In Ireland it is the simple and obvious ground of the welfare of the animals themselves,[29] whereas in England the view has been taken that they are charitable because they benefit humanity, in that they promote morality by checking the innate tendency to cruelty, and helping to develop the finer side of human nature.[30]

iii. Political Trusts. Trusts whose object, direct or indirect, is the support of one of the political parties are clearly non-charitable.[31] But it is difficult to lay down with precision a rule that a

[22] [1947] A.C. 447; Nathan & Marshall, No. 50.
[23] [1955] A.C. 572.
[24] [1953] A.C. 380.
[25] [1948] A.C. 31; *ante*, p. 265.
[26] *Post*, p. 270.
[27] *Re Douglas* (1887) 35 Ch.D. 472 (home for lost dogs); *Swifte* v. *Att.-Gen.* [1912] 1 Ir.R. 133.
[28] Such trusts will merely be trusts of imperfect obligation; *ante*, Chap. 11.
[29] *Armstrong* v. *Reeves* (1890) 25 L.R.Ir. 325.
[30] *Re Wedgwood* [1915] 1 Ch. 113; *Re Moss* [1949] 1 All E.R. 495; *cf. Re Grove-Grady* [1929] 1 Ch. 557.
[31] *Bonar Law Memorial Trust* v. *I.R.C.* (1933) 49 T.L.R. 220 (Conservative); *Re Ogden* [1933] Ch. 678 (Liberal); *Re Hopkinson* [1949] 1 All E.R. 346 (Socialist; the whole tenor of the gift was to mask political propaganda as education). It is doubtful whether *Re Scowcroft* [1898] 2 Ch. 638 would now be followed; the case itself might have been differently decided had the gift been only for the furtherance of Conservative principles.

trust in the fulfilment of which politics may be involved must necessarily fail. The fact that the main purpose of the Anti-Vivisection Society is to procure the statutory prohibition of vivisection was treated as fatal to its admission as a charitable association by the majority of the House of Lords in *National Anti-Vivisection Society* v. *I.R.C.*[32] But it is submitted that this view is far too sweeping; it would certainly exclude a gift in aid of the labours of any Law Reform Committee. Lord Normand stressed the necessity for looking at the *predominant* object of the gift, and Lord Porter, who dissented, would have excluded only trusts *purely* political, that is to say, whose object can be attained *only* by a change in the law. But the view of the majority has, if anything, been extended. In *Re Shaw*,[33] there was a trust to secure more information about a revised alphabet of 40 letters. It is true that a new alphabet could only be imposed by legislation, but legislation would not seem to be a prime object of the trust. Nevertheless, Harman J. held that there was a sufficiently legislative flavour to attract to it the label "political trust," and that it was therefore void. This decision goes much further than is warranted.

iv. Charitable Work Overseas. Trusts for international co-operation have proved difficult to confine within the strict pale of charity,[34] though there is no reason, in principle, why they should not be charitable. There is little or no authority on English charities operating overseas. The Charity Commissioners and the Revenue[35] act on the view that the advancement of religion and education and the relief of poverty are charitable in all parts of the world, but that in the case of trusts under the fourth head, there must be benefit to the community of the United Kingdom. This need not be direct benefit, and is easier to establish in relation to commonwealth countries than to foreign countries. The Commissioners emphasise, however, that these are only speculative opinions and do not necessarily represent the law.[36]

v. Specific Heads of Charity Mentioned in the Preamble and Certain Other Exceptional Cases. The preamble referred to the "relief of aged, impotent and poor people." These words are to

32 [1948] A.C. 31; Nathan & Marshall, No. 49.
33 [1957] 1 W.L.R. 729; this was G. B. Shaw's will. Harman J.'s judgment may be a literary masterpiece but it has been necessary in these pages to criticise each of the three points it decides. An appeal to the Court of Appeal was compromised: [1958] 1 All E.R. 245.
34 *e.g.*, *Re Strakosch* [1949] Ch. 529; *cf. Keren Kayemeth Le Jisroel* v. *I.R.C.* [1932] A.C. 650.
35 See the Report of the Charity Commissioners for 1963, pp. 26–27.
36 For a Commonwealth view see *Re Lowin* [1965] N.S.W.R. 1624; [1967] 2 N.S.W.R. 140.

be read disjunctively. In *Re Robinson*[37] a gift for "old people over 65" in a district, and in *Re Lewis*[38] a gift for ten blind girls and ten blind boys of Tottenham, were upheld. As with poverty, there must be "relief" of age or impotence, so that only those who can be benefited in a practical way will be eligible; trusts for "aged millionaires" are not charitable![38a]

Some of the other instances given in the preamble occasionally receive mention,[39] but there is reluctance to rely on them if the gift would not otherwise be charitable under Lord Macnaghten's classification. Their effect, now that the preamble is no longer on the Statute Book, is obscure, but those that have been acted on by the courts will presumably continue in effect, for the preamble was never a substantive provision and hence its repeal cannot affect the authority of cases based on it.

Particular difficulty has been experienced with the "locality cases." The restriction of a benefit to a precise locality seemed at one time to colour the judges' views of the nature of the benefit. By a benevolent construction, the benefits conferred were construed as being charitable. These cases[40] were discussed by Lord Simonds in *Williams' Trustees* v. *I.R.C.*,[41] by Lord Greene M.R. in *Re Strakosch*,[42] and by the Court of Appeal in *I.R.C.* v. *Baddeley*.[43] They are to be treated as anomalous and not to be extended. They will, however, be followed in cases directly similar.[44] At the other end of the locality scale, a gift "unto my country England" is a valid charitable gift.[45]

F. The Interpretation of Charitable Gifts and Purposes

A number of separate points that need mention can be usefully gathered together under this composite heading.

i. Motive of the Donor. The charitable motive of a donor, even if expressed, is not of major significance. This rule cuts both ways.

[37] [1951] Ch. 198, correcting Russell J. in *Re Lucas* [1922] 2 Ch. 52, who thought that a gift for old people must fail unless it could be implied that they must also be poor.

[38] [1955] Ch. 104; *Re Resch's Will Trusts* [1969] 1 A.C. 514; *sub nom. Le Cras* v. *Perpetual Trustee Co.* [1967] 1 All E.R. 915; Tiley, p. 226.

[38a] *N.S.W. Nursing Service* v. *Willoughby M.C.* [1968] 2 N.S.W.R. 791.

[39] *e.g.*, the "setting out of Soldiers": *Re Driffill* [1949] 2 All E.R. 933 is a recent illustration of this variety of case.

[40] *e.g.*, *Goodman* v. *Saltash Corp.* (1882) 7 App.Cas. 633; *Att.-Gen.* v. *Lonsdale* (1827) 1 Sim. 105; *In Re Christchurch Inclosure Act* (1888) 38 Ch.D. 520; *Jones* v. *Williams* (1767) Amb. 651.

[41] [1947] A.C. 447 at pp. 459–460.

[42] [1949] Ch. 529 at pp. 539–540.

[43] [1953] Ch. 504 at p. 527.

[44] *In Re Fishermen of Newbiggin by the Sea, The Times*, November 15, 1957.

[45] *Re Smith* [1932] 1 Ch. 153, following *Nightingale* v. *Goulburn* (1847) 5 Hare 484.

In *Re King*,[46] a charitable gift was given with an expressed non-charitable intent; the gift was held charitable. Conversely, a non-charitable gift cannot be validated by being charitable in intent.[47] But a clear charitable intent may help to turn an ambiguity in charity's favour, especially in cases of trusts to relieve poverty.[48] But if expressed too widely, it may again prove a double-edged weapon by incorporating benevolent objects.

ii. The Substance and the Form. The courts may look at the substance of a trust and not at a sham charitable exterior. In *Re Hopkinson*,[49] Vaisey J. looked at the substance of an apparently educational trust, including the politics of its trustees, to hold it political and accordingly not charitable. This is a rare type of case, however. A problem of more concern in recent years has been that of trusts for obviously charitable purposes coupled with a purported priority in favour of a class that would not itself be charitable; for instance, an educational charity with priority for children of employees of a company. Such priorities, if they constitute an obligation on the trustees, would seem to destroy the charitable character of the assets devoted to them.[50]

iii. Main and Subsidiary Objects. The most important groups of cases to be discussed under this heading are those in which the objects and purposes of alleged charitable trusts and institutions are analysed to determine whether "the main purpose of the body . . . is charitable and the only elements in its constitution and operations which are non-charitable are merely incidental to that purpose."[51] For a trust in which assets *may* be spent on the advancement of non-charitable purposes as such, is itself non-charitable unless those non-charitable purposes are entirely subsidiary to its main charitable purposes.

Failure of a trust for this reason is fairly obvious in cases such as *Morice* v. *Bishop of Durham*,[52] and *I.R.C.* v. *Baddeley*[53] where

46 [1923] 1 Ch. 243 (window in a church intended as a memorial).
47 *Re Hummeltenberg* [1923] 1 Ch. 237; Nathan & Marshall, No. 32; *National Anti-Vivisection Society* v. *I.R.C.* [1948] A.C. 31; Nathan & Marshall, No. 49; *ante*, p. 265.
48 *Ante*, p. 264. It may also show that a gift is not a beneficial one to a person, although he appears to be a beneficiary: *Re Satterthwaite's W.T.* [1966] 1 W.L.R. 277.
49 [1949] 1 All E.R. 346; *cf. Att.-Gen.* v. *Whorwood* (1750) 1 Ves.Sen. 534.
50 It is difficult to justify the decision in *Re Koettgen's W.T.* [1954] Ch. 252 and not possible to draw analogies to old principles such as Founder's Kin; see *Caffoor Trustees* v. *Comm. of Income Tax, Colombo* [1961] A.C. 584 and also *I.R.C.* v. *Educational Grants Association* [1967] Ch. 993.
51 *Per* Lord Cohen in *I.R.C.* v. *City of Glasgow Police Athletic Association* [1953] A.C. 380 at p. 405.
52 (1804) 9 Ves.Jr. 399; (1805) 10 Ves.Jr. 522 ("objects of benevolence and liberality").
53 [1955] A.C. 572; *ante*, p. 267.

the purposes are patently too widely expressed, but it is less obvious in cases where the non-charitable element is latent.

> In *Ellis* v. *I.R.C.*,[54] realty was conveyed to trustees upon trust for use "generally in such manner for the promotion and aiding of the work of the Roman Catholic Church in the district as the Trustees with the consent of the Bishop may prescribe." In *Oxford Group* v. *I.R.C.*,[55] a company had among its objects "the maintenance, support, development and assistance of the Oxford Group Movement in every way." In both cases the Court of Appeal held that assets could be spent on subsidiary objects which were not necessarily conducive to the main (and undoubtedly charitable) object; such subsidiary objects existed in their own right and prevented the gifts from being "for charitable purposes *only*."
>
> In *Re Cole*,[56] there was a gift upon trust "for the general benefit and general welfare of the children for the time being in Southdown House," a county council maintained home for children. Assuming that the home was charitable, still the gift failed; the words "general benefit and general welfare" were wide enough to empower the trustees to expend money on objects which could not be charitable, such as the provision of television sets. Lord Evershed M.R. dissented, holding the quoted words not to be dispositive, but merely allowing for reasonable amenities to be provided in the interests of the children viewed as a whole.[57] His view seems human, sensible and right.

An acute form of this problem occurs where the furtherance of a charitable purpose also benefits individual groups of persons. This may or may not be fatal according to the weight the courts place on it. For instance, in *I.R.C.* v. *City of Glasgow Police Athletic Association*,[58] the House of Lords held that a police athletic association, intended to benefit policemen in Glasgow, was not wholly ancillary to increasing the efficiency of the Glasgow police force and therefore not charitable. Again, while the benefits to the nursing profession as such loomed too large in the constitution of the General Nursing Council in proportion to the advancement of healing,[59] this was not true of surgeons in relation to the

[54] (1949) 31 T.C. 178, following *Dunne* v. *Byrne* [1912] A.C. 407. See also *I.R.C.* v. *Educational Grants Association* [1967] Ch. 993, at pp. 1010 and 1015.
[55] (1949) 2 All E.R. 537. See particularly Tucker L.J.'s summary of the relevant rules at pp. 539–540.
[56] [1958] Ch. 877. Ridiculous results follow: *Re Sahal's Will Trusts* [1958] 1 W.L.R. 1243.
[57] See at pp. 896–897 especially.
[58] [1953] A.C. 380.
[59] *General Nursing Council* v. *St. Marylebone B.C.* [1959] A.C. 540.

advancement of surgery in the constitution of the Royal College of Surgeons.[60]

The decisions turn on the construction of particular instruments,[61] and need not be pursued further. But the courts' attitude to this problem has to be in the forefront of every draftsman's mind.

iv. The Charitable Status of the Trustee. A different type of case is that of a gift to an official whose office is an essentially charitable one. Does the character of the trustees colour "the nature of the trust"? The answer is yes, but again the danger lies in having said too much. A gift to a bishop or a vicar for the furtherance of his work is a charitable gift, but not if it invites the legatee to embrace the social, as well as the religious, aspects of his function. The principle is easy to state and, together with the cases, is conveniently summed up in the judgments of Evershed M.R. and Jenkins L.J. in *Re Rumball*.[62] But the cases turn on the finest possible points. In *Farley* v. *Westminster Bank*,[63] a gift to a vicar "for parish work" was held invalid, the House of Lords refusing to insert "his" before "parish." But in *Re Simson*,[64] a gift to a vicar "for his work in the parish" was held valid. The former phrase is held to be dispositive, thus enlarging the ambit of the gift and producing the result that a charitable trustee holds on non-charitable trusts, while the latter phrase is held to be merely descriptive of the vicar's responsibilities. The many pages in the reports dealing with these refinements and endeavouring to show at length that a dozen or so words mean nothing, bring no credit to our jurisprudence.

Attempts have been made to enlarge the number of charitable offices or institutions to which this process of construction applies but, unless the character of the legatee is exclusively and obviously charitable, such attempts are likely to fail, as happened in *Re Endacott*,[65] where it was unsucccessfully argued that a parish council was such an institution.

v. And/Or Cases. A difficult and often frustrating group of cases is the "and/or" cases.

60 *Royal College of Surgeons* v. *N.P. Bank* [1952] A.C. 631.

61 See also *Re Coxen* [1948] Ch. 747, where a large gift to a charity included provision for an annual dinner for the trustees; this was held charitable as being ancillary to the better administration of the charity.

62 [1956] Ch. 105 (a gift "to the bishop for the time being of the diocese of the Windward Islands to be used by him as he thinks fit in his diocese" held to be charitable).

63 [1939] A.C. 430.

64 [1946] Ch. 299.

65 [1960] Ch. 232; Nathan & Marshall, No. 28. See especially at pp. 242–243, *per* Lord Evershed M.R.

(a) *Cases of "or."* In *Blair* v. *Duncan*[66] the words were "such charitable or public purposes as my trustee thinks proper"; in *Houston* v. *Burns*,[67] "public, benevolent, or charitable purposes"; in *Chichester Diocesan Fund and Board of Finance* v. *Simpson*[68] "charitable or benevolent"; in each of these cases the gift was held not to be charitable, in that the words were wide enough to justify the trustees in disposing of the fund, or an unascertainable part of it, to non-charitable objects.

In *Re Macduff*,[69] a bequest of money "for some one or more purposes, charitable, philanthropic or ——" was held to be bad, not by reason of the blank, but because there may be philanthropic purposes that are not charitable.

But in *Re Bennett*[70] the words were "charity, or *other* public objects in the parish of Faringdon," and Eve J. held that the addition of the word "other" entitled him to apply the *ejusdem generis* rule of interpretation, and dispensed him from the necessity of reading the two things disjunctively; the gift was, therefore, upheld as a charitable gift of the whole.

(b) *Cases of "and."* Lord Davey in *Blair* v. *Duncan*[71] said that if the words had been "charitable *and* public," effect might be given to them, because they could be construed to mean charitable purposes of a public character. Some cases support this view, the word "and" being regarded as having the power to draw the other word into the orbit of the charitable. This view is borne out by *Re Sutton*[72] and *Re Best*,[73] where gifts to "charitable and deserving objects" and "charitable and benevolent" objects respectively were upheld. But the addition of a third word, "without any conjunction, copulative or disjunctive,"[74] was in *Williams* v. *Kershaw*[75] held fatal to a gift to "benevolent, charitable and religious" purposes, and *Re Eades*[76] goes further, for Sargant J. refused to uphold a gift for "such religious, charitable and philanthropic objects" as three named persons should jointly appoint.

[66] [1902] A.C. 37.
[67] [1918] A.C. 337. The purposes were also confined to a particular parish and its environs: on this point, see *ante*, p. 271.
[68] [1944] A.C. 341; the trustees of the will paid the sums over to various charities, not anticipating the litigation by the next-of-kin which, in the event, occurred, and the sequel was *Ministry of Health* v. *Simpson* [1951] A.C. 251.
[69] [1896] 2 Ch. 451.
[70] [1920] 1 Ch. 305.
[71] [1902] A.C. 37, 44.
[72] (1885) 28 Ch.D. 464.
[73] [1904] 2 Ch. 354; *cf. Att.-Gen.* v. *Herrick* (1772) Amb. 712 (charitable and pious uses—here, the objects being unspecified, and no trust being created, the gift fell to the Crown, to be disposed of by Sign Manual).
[74] *Per* Pearson J. in *Re Sutton* (1885) 28 Ch.D. 464, 466.
[75] (1835) 5 Cl. & F. 111n.
[76] [1920] 2 Ch. 353.

In *Att.-Gen.* v. *National Provincial and Union Bank of England*[77] there was a gift of part of the residuary estate "for such patriotic purposes or objects and such charitable institution or institutions or charitable object or objects in the British Empire" as the trustees should select. The House of Lords interpreted this as a gift for any or all of four categories, two of which might not be charitable, and so held the whole gift void.

So we cannot say more than that prima facie the word "or" causes the words to be read disjunctively; the word "and" causes them to be read conjunctively.

vi. Severance and the Charitable Trusts (Validation) Act 1954. It will be clear from the above account that a charitable trust will fail if its assets may be devoted to non-charitable purposes. Generally speaking, the courts will not sever the non-charitable so as to validate the remainder; there is, however, a limited doctrine of severance.[78]

> In *Salusbury* v. *Denton*,[79] a testator bequeathed a fund to his widow to be applied by her in her will, in part towards the foundation of a charity school, and as to the rest towards the benefit of the testator's relatives. The widow died without making any apportionment, but it was held, relying on the maxim "Equality is Equity," that the court would divide the fund into two equal halves.

The distinction between this and the "charitable or benevolent" cases is well brought out by Page-Wood V.-C.[80] "It is one thing to direct a trustee to give *a part* of a fund to one set of objects, and the *remainder* to another, and it is a distinct thing to direct him to give 'either' to one set of objects 'or' to another. . . . This is a case of the former description. Here the trustee was bound to give a part to each." The crux of the matter is that the whole of a fund cannot be devoted to non-charity; once this is established,[81] the court will endeavour to quantify what proportion of the capital assets is needed to support the non-charitable part,[82] and then hold the remaining part to be validly devoted to charity. If quantification is not possible

77 [1924] A.C. 262.

78 This doctrine is not peculiar to charitable trusts, but applies where there is a trust that is partly lawful and partly unlawful.

79 (1857) 3 K. & J. 529.

80 At p. 539; the italics are the Vice-Chancellor's.

81 It may involve fine points of construction; *Re Porter* [1925] Ch. 746; *Re Dalziel* [1943] Ch. 277; Nathan & Marshall, No. 54.

82 In most cases this will produce *pro tanto* voidness.

the court will divide equally.[83] Judges have varied in their readiness to quantify.

> In *Re Coxen*,[84] a testator gave the residue of his estate, amounting to more than £200,000, to the Court of Aldermen of the City of London for charitable purposes, providing however that one guinea should be paid to each of the six aldermen chosen to administer the trust on the occasion of his attending any meeting to administer the trust, and that £100 p.a. be used for an annual dinner for the Court of Aldermen when it should meet to discuss the business of the trust. On the assumption that these administrative provisions were not charitable,[85] quantification was desirable, for a division into equal parts would be absurd. Jenkins J. held that the court would find the necessary means to quantify the maximum slice of capital that would be needed to support them.

The Nathan Committee [86] considered the problem of severance at some length, but eventually took a conservative view which led to the Charitable Trusts (Validation) Act 1954, an Act whose drafting has rightly attracted the judges' displeasure.[87] It only affects invalid trusts [88] that had been brought into existence before the date of the publication of the Report (on December 16, 1952) and which had not been declared invalid before that date; if such a trust was invalid because it empowered trustees, not only to apply the whole of its assets for charitable purposes, but to spend on non-charitable purposes as well, then as from July 30, 1954, the trusts should be deemed to be constituted for charitable purposes only. This purely retrospective Act covers many types of limitations, such as those in *Oxford Group* v. *I.R.C.*[89] and *Chichester Diocesan Fund* v. *Simpson*,[90] and has been of great assistance,[91] but an argument has raged as to whether a limitation to " worthy objects," in which there is no express mention of charity, is covered.[92] The answer probably depends on

[83] *Hoare* v. *Osborne* (1866) 1 Eq. 585; *Re Vaughan* (1886) 33 Ch.D. 187.
[84] [1948] Ch. 747; see Jenkins J.'s invaluable summary at p. 752 of the rules of severance, including various sub-rules and exceptions, *e.g.*, the " tomb " cases; *Re Rogerson* [1901] 1 Ch. 715. See also *Re Clarke* [1923] 2 Ch. 407.
[85] Jenkins J. later decided that they were charitable; *ante*, p. 274n.; the case contains three *rationes decidendi*, and is a fascinating essay in the doctrine of precedent.
[86] Cmd. 8710, Chap. 12.
[87] *e.g.*, Harman L.J. in *Re Harpur's W.T.* [1962] Ch. 78 at pp. 95–96.
[88] So that the rules of severance that we have just been considering come first; s. 2 (1) of the Act.
[89] [1949] 2 All E.R. 537.
[90] [1944] A.C. 341.
[91] Report of the Charity Commissioners 1963, para. 38.
[92] *Re Gillingham Bus Disaster Fund* [1959] Ch. 62 at pp. 75, 77, 80; Nathan & Marshall, No. 62; *Re Wykes* [1961] Ch. 229; *Re Mead's Trust Deed* [1961] 1 W.L.R. 1244.

whether there is a clear flavour of charity present, "a quasi-charitable trust" as Cross J. has put it[93]; the donor of such a gift would not feel that his intentions were being distorted by the whole of his gift being made available to charity. This accords with the view of the Privy Council on a comparable issue of Dominion legislation.[94] It would thus cover "worthy causes," but not a case involving the mere possibility of charitable benefit.[95]

Dominion legislation[96] goes much further, and gives the courts a "blue pencil" power. Where non-charitable purposes are, or are deemed to be, within the ambit of a trust obviously intended to be charitable,[97] the trust is carried out as if the non-charitable element were not present. The principle of such legislation seems acceptable[98] and it is a pity that the Nathan Committee hesitated to recommend its adoption here.

3. Administration of Charitable Trusts[99]

The Charity Commissioners, as constituted under the Charities Act 1960, have very considerable powers over charities, and the means of ensuring that trustees of charities carry out their duties to full advantage. The changes made in 1960 have been of major significance.

Charities must be registered[1] with the Commissioners, who sit as a Board to determine applications for registration which raise difficulties. Registration is conclusive proof[2] of charitable status, save that circumstances may change and necessitate rectification. Thus a useful method exists of establishing a trust's claim to a fiscal privilege, and one that seems more sensible than a preliminary claim being heard by the Inland Revenue, as hitherto. It goes some, but not all, the way to meeting the criticisms previously discussed.[3] Anyone concerned may object to a decision of the Commissioners, and appeals to the court are by way of a rehearing.

93 *Re Saxone Shoe Co. Ltd.'s Trust Deed* [1962] 1 W.L.R. 943 at pp. 957–958.
94 *Leahy* v. *Att.-Gen. for New South Wales* [1959] A.C. 457 at pp. 474–476; Nathan & Marshall, No. 30. It is strange that this analysis is not referred to in the later English cases.
95 *Cf. Re Mead's Trust Deed* with *Re Saxone Shoe Co. Ltd.'s Trust Deed, supra. Re Mead* goes rather far in restricting a trust to "poor" members of a union.
96 (Victoria) Property Law Act 1928, s. 131; (New South Wales) Conveyancing Act 1938, s. 37D; (New Zealand) Trustee Amendment Act 1935, s. 2; (Western Australia) Trustees Act 1962, s. 102.
97 *Leahy* v. *Att.-Gen. for New South Wales* [1959] A.C. 457; Nathan & Marshall, No. 30.
98 See (1967) 16 I.C.L.Q. 464 (M. Cullity).
99 The annual reports of the Charity Commissioners contain much interesting information on the subject.
1 Charities Act 1960, s. 4. Some are exempt, *e.g.*, religious charities and certain educational charities.
2 Charities Act 1960, s. 5.
3 *Ante*, p. 256.

The main purpose of registration, however, is to make the existence of charitable trusts more widely known, and, with this end in view, sections 10 and 12 of the Charities Act 1960 make provision for local registers and the active participation of local authorities in charitable reorganisation.

The Commissioners will advise [4] charitable trustees on matters affecting their trust, save for investment advice. If trustees prefer not to handle the investment side of their trust, they may transfer the assets to the Charities Official Investment Fund, in which case they become administrators of the income only. Alternatively, the assets of several charities may be pooled or held by managing trustees.[5] The Commissioners can demand accounts [6] and, if dissatisfied in any way, may institute inquiries.[7] Ultimately, they may remove trustees from office.[8] They also have considerable power over dealings affecting charitable assets, *e.g.*, mortgages, and these powers prevail over any contrary provisions in a trust deed.[9]

Section 13 (5) of the Charities Act 1960 enacts: "It is hereby declared that a trust for charitable purposes places a trustee under a duty, when the case permits and requires the property or some part of it to be applied cy-près, to secure its effective use for charity by taking steps to enable it to be so applied." This is a striking enactment,[10] and is implemented by the large powers [11] given to the Commissioners to institute schemes reorganising, amalgamating and altering charitable trusts to ensure that the community benefits from them to the full.

4. The Cy-Près Doctrine

The word *cy-près* has several connotations. In connection with charities, the *cy-près* application of a fund means the application of that fund to objects or purposes which are not precisely those the donor provided for, but which as nearly as possible fit his intentions. It is obvious that such a power of altering purposes must be hedged round with safeguards, but in recent years, especially in connection with trusts with long outmoded purposes, it has been found necessary

[4] Charities Act 1960, s. 24.
[5] See the Report of the Charity Commissioners 1963, paras. 43–65, and Charities Act 1960, s. 22.
[6] Charities Act 1960, ss. 8 and 32. This may reveal that the trustees have not understood their obligations. For instance, a trust for "educational" purposes must not be administered in such a way that a restricted class (not being a section of the community) is being preferred to the rest of the community: see *I.R.C.* v. *Educational Grants Association Ltd.* [1967] Ch. 993.
[7] Charities Act 1960, s. 6.
[8] Charities Act 1960, ss. 18 and 20.
[9] Charities Act 1960, ss. 23 and 29.
[10] *Cf.* T.I.A. 1961, s. 6 (1).
[11] ss. 13–15 and 18–19.

to relax them. Application *cy-près* is justified in varying circumstances, but the cases can be considered under two heads: first, the problems that arise at the commencement of a charitable trust, to which the width of charitable intent provides the answer; secondly, problems that only arise subsequently, to which perpetual dedication to charity provides the answer.[12]

A. Cy-Près on the Commencement of a Charitable Trust. Width of Charitable Intent

The width of intent with which a gift is made to charity may prevent that gift from failing (as it would in the case of a non-charitable gift) due to some defect in the manner of the gift. A gift upon trust [13] to charity generally, without mention of specific objects, is an example. The court will direct a scheme to remedy the uncertainty, which it would not do outside of charity. But the width of charitable intent need not be as wide as that. A type of charity may have been indicated without it being clear which of a number of claimants was really meant. The court may direct a scheme or, if the possible claimants are few, divide equally between them.[14] Again, a gift may be expressed to be in favour of a specific named charity which has ceased to have a separate existence; it may have been amalgamated with a similar charity by scheme, or have been reconstituted under more effective trusts. In many of these cases [15] the court will construe such gifts *as being for the purposes carried on by* the specific named charity so that the nomination of a defunct charity as a beneficiary does not cause the gift to fail and fall into residue. Instead the new gift is added to the assets of the old charity (if they can be traced) or diverted to a society doing the work of the old one.[16]

But it is not always possible to adopt this process of construction. The courts will in some cases be forced to conclude that a charity that has ceased to exist was chosen for a reason peculiar to it alone.[17]

[12] See generally Sheridan and Delany, *The Cy-près Doctrine*; Keeton, *The Modern Law of Charities*; Nathan Committee Report (Cmd. 8710), Chap. 9. For reasons suggested at (1960) 76 L.Q.R. 601 (J. D. Davies) it is difficult to accept Sheridan and Delany's theory of "out and out gifts."

[13] *Ante*, p. 255. A charitable gift upon trust gives the court jurisdiction—judicial *cy-près*; a gift to charity but not upon trust is disposed of by the Crown—prerogative *cy-près*. The distinction is not always observed.

[14] *Re Songest* [1956] 1 W.L.R. 897, where it was clear that an ex-servicemen's charity was to benefit. Ultimately, the one really meant emerged: [1956] 1 W.L.R. 1311.

[15] *Re Faraker* [1912] 2 Ch. 488; *Re Lucas* [1948] Ch. 424; *cf.* charitable bodies with express power to terminate; *Re Stemson's W.T.* [1969] 3 W.L.R. 21.

[16] But in *Re Slatter's W.T.* [1964] Ch. 512, a tuberculosis hospital had closed because the need for it had diminished: a gift for its purposes had to fail.

[17] *Re Rymer* [1895] 1 Ch. 19. See also *Re Wilson* [1913] 1 Ch. 314.

In such cases the gift will lapse as is the case with a non-charitable gift. The absence of the larger intent excludes *cy-près*.[18]

Another type of case is that in which a testator makes a number of bequests to institutions all of which are charitable save one, and that one might well be thought by the average testator to be charitable. Can an intent to benefit charity be inferred from this context, though the gift itself is clearly non-charitable, so as to enable *cy-près* to save such a gift from voidness? In *Re Jenkins' Will Trusts*[19] Buckley J. found this an almost impossible inference to make, even where all the bequests showed an intent to benefit animals, though in a decision given twelve days earlier, but not cited to him, the Court of Appeal had indicated that such an inference might be drawn in a suitable case.[20]

The larger intent is the crux of the matter in all these cases; the *cy-près* doctrine does not distort a donor's intent, but gives effect to it in a case in which he has gone on to particularise it in a way that cannot be implemented. This larger intent is often referred to as "general charitable intent," but "general" is not a technical requirement; it is relative to each case and is better referred to as "paramount charitable intention."[21] Thus, in *Re Lysaght*,[22] though there was no "general" charitable intent, but only an intent to found a particular medical studentship, a condition attached to the gift that would otherwise have led to the studentship not being instituted could be deleted. *Cy-près* is thus a remedy as well as a doctrine.

The rules governing gifts to institutions and the rules governing charitable schemes designed by donors themselves are, in principle, the same.[23] If, when a gift providing for such a scheme is made, the scheme is on the balance of probabilities incapable of being implemented, there will be a lapse or resulting trust unless, behind the scheme, there was a wider intent to which effect can be given. There is, it will be noted, no "wait and see" provision.[24] Until 1960 gifts

[18] It is easier to find the necessary width of intent where an apparently specifically chosen charity cannot be shown ever to have existed than where it has ceased to exist: *Re Harwood* [1936] Ch. 285. It is surprising that the emphasis in this will on Peace Societies did not itself constitute the necessary intent.

[19] [1966] Ch. 249.

[20] *Re Satterthwaite's W.T.* [1966] 1 W.L.R. 277 at pp. 284 and 286.

[21] See the admirable analysis by Buckley J. in *Re Lysaght* [1966] Ch. 191 at pp. 201–202.

[22] [1966] Ch. 191; Nathan & Marshall, No. 58. It was held, perhaps rather remarkably, that it was an essential part of the testatrix's scheme that the Royal College of Surgeons should be the trustees, but the College refused to accept the office unless a clause discriminating against Jews and Roman Catholics was deleted.

[23] These various rules apply to donors and testators alike; but gifts to defunct institutions usually occur in wills, while gifts to ineffective funds are often *inter vivos*.

[24] *Re White's W.T.* [1955] Ch. 188; *Re Tacon* [1958] Ch. 447; at pp. 453–455 Lord Evershed M.R. admirably summarises these rules.

to charitable funds or appeals were governed likewise, but the result was inconvenient in appeals which never got off the ground or otherwise failed initially. Many of these gifts were of small sums, often in collecting boxes. The Charities Act 1960 [25] now authorises application of the funds *cy-près*, subject to certain safeguards, without a wider charitable intent being demonstrated.

B. Cy-Près After the Commencement of a Charitable Trust. Perpetual Dedication to Charity

Once assets are effectively dedicated to charity, there can be no question of a lapse or a resulting trust save where the gift effectively provides for it. Width of charitable intent becomes irrelevant the moment that a dedication to a charity takes effect.

In *Re Wright*,[26] a testatrix who died in 1933 provided for the foundation, on the death of a tenant for life, of a convalescent home for impecunious gentlewomen. The scheme was practicable in 1933, but the balance of probabilities was against it in 1942 when the tenant for life died. The Court of Appeal held that 1933 was the crucial date; at that date the scheme was practicable, dedication to charity occurred, and the possibility of a lapse or resulting trust was excluded. *Cy-près* was available in 1942 irrespective of width of charitable intent.

This rule is now firmly established,[27] but it was not always so, and it is not possible to reconcile some earlier cases on the subject, in particular the " surplus " cases.

In *Re King*,[28] residue worth £1,500 was bequeathed for one stained glass window in a church. The cost of the window could not exceed £800. Romer J. held that the whole £1,500 had been dedicated to charity with the necessary consequence that any surplus would be applied *cy-près* (in fact for a second window) irrespective of width of intent.

But in *Re Stanford*,[29] where £5,000 was bequeathed for the purpose of completing and publishing an etymological dictionary and over £1,500 remained unspent when the task was complete, Eve J. held that the surplus fell into residue.

[25] s. 14, reversing *Re Ulverston and District New Hospital Building Trusts* [1956] Ch. 622. But if the fund is not charitable, the section does not apply even though donors would think it was charitable: *ante*, p. 206.

[26] [1954] Ch. 347.

[27] See *Re Tacon, supra*; Jenkins L.J. in *Re Ulverston, etc.* [1956] Ch. 622 at pp. 635–637 and Buckley J. in *Re Lysaght* [1966] Ch. 191 at p. 208; Nathan & Marshall, No. 58.

[28] [1923] 1 Ch. 243.

[29] [1924] 1 Ch. 73. *Post*, p. 285, note 41.

It is submitted that the latter decision is incorrect, and that a dedication of the whole £5,000 had taken place, with the consequence that no resulting trust should have been implied. The appropriate solution was *cy-près*. Even if a resulting trust were to be implied, it should not be in a better position than express provisions for reverter, which are now subject to the rule against perpetuities.

C. Termination in Favour of Non-Charity

The question is this—to what extent can a gift to charity be brought to an end in favour of non-charity? The answer used to depend on the technicalities of conveyancing.[30] A possibility of reverter consequent upon the termination of what was known as a determinable interest was immune from the perpetuity rule, while a gift over (in any form) was subject to it. The distinction was lamentable, being in effect only a matter of drafting,[31] but was well established.[32] In addition, the courts would occasionally imply a resulting trust in order to give effect to a restricted charitable intent that had exhausted itself, and such a resulting trust was also immune from the perpetuity rule.[33] Hence, it was possible by the use of appropriate language to bring about a devolution of charitable funds at a distant and uncertain point in time against the general policy of the perpetuity rule. Where the language of determinable interests was not used, however, but that of an absolute gift subject to an executory gift over which was void, the effect was to render the initial gift absolute. It could continue indefinitely,[34] if appropriate, or could be made the subject of a scheme *cy-près*.[35] There would never be a resulting trust.

But the position is altered by the Perpetuities and Accumulations Act 1964, s. 12, in relation to instruments coming into operation after July 16, 1964. Possibilities of reverter and resulting trusts are subjected to the rule. But the rule is itself considerably altered by the Act, in particular by the "wait and see" provision, which prevents interests being void, because they *might* vest outside the perpetuity period. A few examples will show the considerations that now govern these cases.

[30] See further Morris and Leach, Chap. 7, and (1961) 25 Conv.(N.S.) 56 (J. D. Davies).
[31] "So long as," "until" and similar words denote a determinable interest; *ante*, pp. 172, 238.
[32] See (1937) 53 L.Q.R. 24 at p. 57 (W. O. Hart).
[33] *Re Stanford* [1924] 1 Ch. 73, criticised *ante*, p. 282; *Re Cooper's Conveyance Trusts* [1956] 1 W.L.R. 1096; *post*, p. 285.
[34] *Re Engels* [1943] 1 All E.R. 506. For an unusual example with the effect of allowing the whole of a sum given by a settlor to be applicable to only a part of his scheme, see *George Drexler Ofrex Foundation Trustees* v. *I.R.C.* [1966] Ch. 675.
[35] *Re Peel's Release* [1921] 2 Ch. 218.

In *Re Randell*,[36] a testatrix bequeathed £14,000 to trustees upon trust that they should pay the annual proceeds to the successive incumbents of a church "so long as the . . . incumbents shall permit all the sittings in the said church to be occupied free of all claims for pew rents." There was a void direction for the £14,000 to fall into residue should pew rents be claimed. North J. held that the limitation was a determinable one and that, on pew rent being claimed (at however remote a future date), a resulting trust would arise.

Under the new law such a resulting trust is subject to the rule, and a "wait and see" period will apply.[37] If, during the "wait and see" period, pew rents are claimed, the resulting trust will come into effect but, if the rents are not claimed within the period, the initial gift will become absolute. The "wait and see" period is not a fixed one, however. Section 1 of the Act enables a period of up to 80 years to be chosen; but if section 1 is not taken advantage of, the "wait and see" period will depend on the duration of certain lives in being specified in section 3; when, for the purposes of the disposition in issue, there are no such lives, we fall back on a period of 21 years. A limitation such as that in *Re Randell*[36] would now produce a "wait and see" period of 21 years, but it would be a different period (its actual length would have to wait upon events) if either it were an *inter vivos* gift, or the gift over on the pew rents being claimed were in favour of ascertainable persons. In view of the uncertain and often capricious operation of section 3, donors of charitable gifts who wish to provide for the subsequent devolution of their funds in favour of non-charity are well advised to limit themselves to the 80-year period provided by section 1. Even so, they must be warned that as soon as it becomes established that their gift over can only occur after the end of the period, the initial gift will at that moment become absolute.

In *Re Peel's Release*,[38] a donor conveyed land to trustees to be used for the education of seventy poor children, but he went on to provide that if certain conditions could not in the future be complied with, the land was to revert to the donor, his heirs or assigns. Sargant J. held that the provision for reverter, being conditional not determinable, was caught by the rule against perpetuities and, as it could take effect at any time in the future, was void, and had been void from the very beginning. The land was accordingly devoted to charity in perpetuity.

[36] (1888) 38 Ch.D. 213.
[37] Perpetuities and Accumulations Act 1964, ss. 3 and 12.
[38] [1921] 2 Ch. 218.

Under the new law, the provision for reverter would not be void *ab initio*; section 3 (5) of the Act would produce a "wait and see" period consisting of the life of the donor plus 21 years.

Limitations of the sort that arose in *Gibson* v. *South American Stores*[39] and *Re Cooper's Conveyance Trusts*[40] would also now raise different considerations. In each of these cases there was a provision for the bringing to an end of a charitable trust, and in each that provision was void for perpetuity. Nevertheless, the courts implied a resulting trust, holding that there was no intent to devote assets to charity in perpetuity. Such a process of implication was, even before the Act, scarcely legitimate, as it involved reintroducing width of charitable intent after a dedication to charity had occurred. It is submitted that only *express*[41] provisions for devolution should be capable of having this effect and that they must take effect subject to the operation of the 1964 Act, section 12 (1) of which provides that, where a possibility of reverter or a resulting trust is held void for remoteness, the prior gift becomes absolute. In the realm of charity, this means that the dedication to charity is perpetual, that when necessary the *cy-près* doctrine is available, and that no question of width of charitable intent arises. An attempt is made to summarise the effect of these complicated rules below.

D. The Exercise of Cy-Près Jurisdiction. Charities Act 1960, s. 13

In cases arising out of the initial failure of a charitable trust, *cy-près* implements and is governed by donors' intentions. Its purpose is to save certain gifts from failure, not to improve the efficiency of their operation. The terms of a gift will only be altered if those terms render the carrying out of a donor's paramount intention impossible or impracticable.[42] Nor does the Charities Act 1960, s. 13, help, since its wording appears to cover only trusts which stand in need of alteration *after a period of operation*, though it is a moot point how long this period of operation must be.

Different considerations apply to charitable trusts that have been in operation. Width of charitable intent is no longer the criterion. Nevertheless, the courts were reluctant to alter trusts, however long they had been in operation, lest too generous an

[39] [1950] Ch. 177 at pp. 198–203.
[40] [1956] 1 W.L.R. 1096.
[41] Hence, if *Re Stanford* [1924] 1 Ch. 73, *ante*, p. 282, were to arise again, there would be no ground for implying a resulting trust and subjecting it to the "wait and see" rule.
[42] *e.g.*, *Re Lysaght* [1966] Ch. 191; Nathan & Marshall, No. 58. For "impracticability," see the cases referred to in note 45, *infra*, and also *Re Robinson* [1923] 2 Ch. 332.

exercise of this jurisdiction were to discourage further charitable gifts. Unless special provision for alteration was made by the trust itself [43] or by statute,[44] the jurisdiction to alter the terms of a charitable trust was only exercised when the operation of the trust had become impracticable.[45] This was far from allowing *cy-près* where it was eminently desirable, hence many trusts could not be used for the real benefit of the public. Relaxation of the requirement of "impracticability" was recommended by the Nathan Committee and implemented in 1960 by the Charities Act 1960, s. 13, which gives to the courts, and to the Charity Commissioners, extensive powers of varying and amalgamating charitable trusts which have been overtaken by time and which "have ceased to provide a suitable and effective method of using the property available by virtue of the gift." Although width of charitable intent is not the basis of the jurisdiction, the Commissioners nevertheless endeavour to follow the spirit of the original gifts,[46] and will not turn a trust for one type of purpose, *e.g.*, poor widows, into another type, *e.g.*, education, but will rather provide the old trust with a similar role that can still be useful in modern social conditions. The importance of this jurisdiction of the Commissioners can hardly be overstated.[47]

The *cy-près* powers of the court extend to altering the terms of a trust so as to render it more advantageous, even if to do so defeats a gift over. This is a jurisdiction to be used only sparingly [48]; it would have surprised an older generation of charity lawyer.[49]

E. Cy-Près.—A Summary

1. A charitable gift may be saved from initial failure by the presence of a wider or paramount charitable intention to which it is possible to give effect. The terms of such a trust will only be altered if it is impossible or impracticable to give effect to them as laid down, and there is present in the gift the necessary wider or paramount intention.

2. Once there is an effective devotion of funds to charity, those funds will remain devoted to charity for ever unless there is in the gift an effective provision for devolution. Save in this special case,

43 *Re Whitworth Art Gallery Trusts* [1958] Ch. 461.
44 There was much piecemeal legislation—see Cmd. 8710, Chap. 9, and Keeton, *op. cit.*
45 *Re Weir Hospital* [1910] 2 Ch. 124. But see Evershed J.'s attempt to make the law move with the times in *Re Dominion Students' Hall Trust* [1947] Ch. 183.
46 See the adverse comments of the Court of Appeal on schemes which failed to observe this rule of practice in *Re Faraker* [1912] 2 Ch. 488 at pp. 494–495.
47 See the successive Annual Reports of the Commissioners for examples.
48 *Re Hanbey's W.T.* [1956] Ch. 264. *Cf. Re Selinger's W.T.* [1959] 1 W.L.R. 217 and *Re Jones* [1948] Ch. 67.
49 See the argument in *Christ's Hospital* v. *Grainger* (1848) 16 Sim. 83 at p. 96.

the possibility of a lapse or a resulting trust is excluded. *Cy-près* is available without there being width of charitable intent. The exercise of the *cy-près* jurisdiction will depend upon Charities Act 1960, s. 13.

3. In cases of instruments coming into effect before July 16, 1964, the distinction between determinable and conditional interests still applies: on a possibility of reverter or a resulting trust taking effect, *cy-près* is excluded. All other provisions for devolution to non-charity are subject to the rule against perpetuities and, when such provisions are void, *cy-près* is available.

4. In cases of instruments coming into effect after July 16, 1964, all provisions for devolution are subject to the reformed rule against perpetuities. Such provisions may take effect within a limited period of time; if they do not, then the gift to charity is perpetual and *cy-près* is available. Provisions for devolution should be express, and resulting trusts will not be implied.

PART IV

TRUSTEES

CHAPTER 16

GENERAL PRINCIPLES: CAPACITY: APPOINTMENT: REMOVAL: RETIREMENT: CONTROL

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1. ONEROUS NATURE OF OFFICE

THE office of trustee is an onerous one. We will discuss in some detail a trustee's duties, powers and liability; there is little to be said as to his rights. In the performance of his office a trustee must act exclusively in the interest of the trust. He stands to gain nothing from his work, unless special provision in the form of a clause authorising remuneration is made.[1] He is required to observe the highest standards of integrity,[2] and a reasonable standard of business efficiency in the management of the affairs of the trust; and he is subjected to onerous personal liability if he fails to reach the

[1] *Post*, p. 367.
[2] *Post*, p. 293.

standards set. Nor may he compete in business with the trust; or be in a position in which his personal interests conflict with those of the trust. He may thus be forced to forgo opportunities which would be available to him if he were not a trustee.[3]

It may well be asked why people consent to become trustees. To this there are two answers. First, professional trustees undertake the work only where express provision is made in the settlement or will providing for their remuneration. Solicitors, banks (Executor and Trustee Departments) and insurance companies come into this category. The Public Trustee is entitled to charge.[4] Most trusts of any size will have a professional trustee. There may be non-professional trustees also; but in any case the bulk of the work of administration—investment, distribution, accounting, tax payments, etc.—will in fact be done by professionals, either the trustees or others employed by them. Second, members of the family of the settlor or testator will often consent to be trustees out of feelings of duty to the settlor or testator. Where there is no professional trustee, the non-professionals will, as will be seen,[5] usually employ professional agents such as a solicitor, stockbroker and accountant to perform the technical duties of the trust. It may well be better to have such experts appointed as trustees, with a power to charge, in the first place, so that technical matters will not be overlooked.[6] We have seen, that, for tax and estate duty reasons, certain interested parties should not be made trustees.[7]

It is usual and common to appoint a mixture of professional trustees and non-professional. There is much to be said for appointing a corporation such as a bank which has unrivalled facilities, dependability and permanence. There is, however, some disadvantage in allowing trustees to be too "official"[8]; for such bodies can never take the slightest risk in respect of a breach of trust however beneficial such a course may be in the interest of the family.[9]

These general principles will be worked out in the sections which follow. It will be convenient also to consider the extent to which the very strict rules relating to the liability of trustees are

3 *Phipps* v. *Boardman* [1967] 2 A.C. 46, *post*, p. 375 *et seq.*
4 Public Trustee Act 1906, s. 9; as amended by Public Trustee (Fees) Act 1957.
5 *Post*, p. 346.
6 Keeton, *The Investment and Taxation of Trust Funds.*
7 *Ante*, p. 194.
8 In *Perrins* v. *Bellamy* [1899] 1 Ch. 797 at p. 798, Lindley M.R. during the argument said, "My old master, the late Lord Justice Selwyn, used to say, 'the main duty of a trustee is to commit judicious breaches of trust'." But Lindley M.R. thought the statement was an exaggeration and preferred "great use" to "main duty": *National Trustees Co. of Australasia Ltd.* v. *General Finance Co. of Australasia* [1905] A.C. 373 at pp. 375–376.
9 As, for example, by investing in equities before the Trustee Investment Act 1961 came into force.

also applicable to other persons, such as agents, partners, etc., who, though not trustees, are under special duties because of their fiduciary position.

2. Standards Applicable to Trustees

A. Duties and Discretions

A distinction must be made between a trustee's duties and his powers or discretions. A duty is an obligation which *must* be carried out. The rules of equity (although, as we will see, they are often relaxed in practice) require strict performance of a trustee's duties; duties are imperative and a trustee must perform them with the utmost diligence.

On the other hand, a power as we have seen, is discretionary; it may be exercised, or it may not. This is so whether the power is one given to trustees by statute, or is a power or discretion contained in the instrument creating the trust, or relates to the general management of the affairs of the trust. Here the trustee must act honestly; and must take, in managing trust affairs, "all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own."[10] To this, there is an exception in relation to investment. A trustee is under a duty to invest; he has a discretion in the selection of investments, but in the exercise of this discretion he is less free than a prudent man would be in investing his own money; for "business men of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust [and now by the Trustee Investments Act 1961][11] and likewise to avoid all investments of that class which are attended with hazard."[12] If he properly performs his duties, powers and discretions, he is not liable for loss[13] to or depreciation[14] of the trust property arising from factors beyond his control.

We will see that many of the rules relating to trustees' duties are more strict in their terms than in their practical application. The past hundred years has brought a great alleviation in the lot of the honest trustee. We saw that much of the work of administration of a trust is necessarily done by professionals. This develop-

[10] *Per* Lord Blackburn in *Speight* v. *Gaunt* (1883) 9 App.Cas. 1 at p. 19; Nathan & Marshall, No. 92; in similar terms, Lord Watson in *Learoyd* v. *Whiteley* (1887) 12 App.Cas. 727 at p. 733.
[11] *Post*, p. 317.
[12] *Per* Lord Watson in *Learoyd* v. *Whiteley* (1887) 12 App.Cas. 727 at p. 733.
[13] *Morley* v. *Morley* (1678) 2 Ch.Cas. 2.
[14] *Re Chapman* [1896] 2 Ch. 763.

ment has led to great relaxation, first by the courts[15] and then by statute,[16] of the requirement that the trustee should act personally. Further, the exculpatory clauses which were commonly inserted into trust instruments excluding the trustees' personal liability have become statutory[16]; and Trustee Act 1925, s. 61, gives the court a discretion to excuse a trustee who has acted honestly and reasonably and ought fairly to be excused.[17]

B. Paid and Unpaid Trustees

It is sometimes said that a higher standard is set for paid trustees than for amateurs. In *Re Waterman's Will Trusts*, Harman J. said[18]: "I do not forget that a paid trustee is expected to exercise a higher standard of diligence and knowledge than an unpaid trustee." It is submitted that this statement may be misleading. A paid trustee is usually a professional trustee, and a professional who holds himself out as possessing special skill will, no doubt, be expected to apply it. Further, a paid trustee will be expected to do more of the work himself and to delegate less; and a paid trustee will be given less opportunity to shelter behind section 61.[19] It may well be that a paid or professional trustee will be expected to have greater personal knowledge and skill. But it is submitted that there is no difference in the standard of diligence expected; indeed, it would be a brave amateur trustee who attempted to excuse himself for lack of diligence on the ground that he was not being paid.

3. Unanimity

Each trustee should be active in the administration of the trust. Equity does not recognise a "sleeping" trustee. A trustee who concurs with his co-trustees has, in so agreeing, as much "acted" as those others, and thus will be equally liable with them to beneficiaries who suffer loss if a breach results.[20] Nor will the concurring trustee necessarily escape liability when his co-trustee was a solicitor, though he may escape if, after considering the matter, he reasonably deferred to what could legitimately be regarded as superior knowledge.[21] But blind trust cannot safely be placed in a co-trustee.

15 *Speight* v. *Gaunt* (1883) 9 App.Cas. 1; Nathan & Marshall, No. 92, *post*, p. 346; *Learoyd* v. *Whiteley*, *supra*; *Shaw* v. *Cates* [1909] 1 Ch. 389; Nathan & Marshall, No. 84.

16 T.A. 1925, ss. 23, 30; *post*, p. 347 *et seq.*

17 *Post*, p. 407.

18 [1952] 2 All E.R. 1054 at p. 1055; *contra Jobson* v. *Palmer* [1893] 1 Ch. 71.

19 *National Trustee Co. of Australasia* v. *General Finance Co. of Australasia* [1905] A.C. 373; *Re Pauling's S.T.* [1964] Ch. 303, at pp. 338, 339.

20 *Bahin* v. *Hughes* (1886) 31 Ch.D. 390; *Re Turner* [1897] 1 Ch. 536; *Wynne* v. *Tempest* (1897) 13 T.L.R. 360. But the co-trustee who concurs may be able to obtain an indemnity from the active trustee; *post*, p. 401.

21 See *Head* v. *Gould* [1898] 2 Ch. 250; *Bahin* v. *Hughes*, *supra*.

For although there is no rule that trustees are vicariously liable for the acts of co-trustees, a non-active trustee may himself be liable for neglecting to take the steps necessary to have prevented the breach.[22]

Trustees cannot act by a majority, unless they are trustees of a charitable trust.[23] A majority binds neither a dissenting minority nor the trust estate.[24] The consequences of this rule need to be appreciated.

In *Re Mayo*,[25] for instance, one trustee of a trust for sale wished to sell, two to postpone. The trustees were by virtue of the trust to sell, under a *duty* to sell, but possessed *power* to postpone. Simonds J. held that their duty to sell prevailed unless they were unanimous in exercising their power to postpone. They were not unanimous on this point; the view of the single trustee who wished to sell prevailed, and the other two were directed to join in the sale.

4. Capacity. Who may be a Trustee

Generally, any person who is able to hold property may be a trustee. An infant cannot hold a legal estate in land[26]; and the Law of Property Act 1925, s. 20, provides that an infant may not be a trustee in relation to any settlement or trust. He has been held, however, to be able to hold personalty on resulting trust.[27]

The Crown may be a trustee[28]; but for various reasons, this would be unsatisfactory.[29]

Corporations may be trustees if permitted to do so by their charter or memorandum of incorporation. "Trust Corporations"[30] in fact enjoy a special position; for instance, where payment cannot ordinarily be made to less than two trustees, payment to a trust corporation alone is frequently justified.[31]

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[22] *Bahin* v. *Hughes*, *supra*; *post*, p. 395.
[23] Charitable Trusts Act 1869, ss. 12, 13.
[24] *Luke* v. *South Kensington Hotel Ltd.* (1879) 11 Ch.D. 121.
[25] [1943] Ch. 302; *cf. Tempest* v. *Lord Camoys* (1882) 21 Ch.D. 571; Nathan & Marshall, No. 109.
[26] L.P.A. 1925, s. 1 (6); Family Law Reform Act 1969, s. 1.
[27] *Re Vinogradoff* [1935] W.N. 68; Nathan & Marshall, No. 19; *ante*, p. 204.
[28] *Civilian War Claimants' Association* v. *R.* [1932] A.C. 14.
[29] Hanbury, *Essays in Equity*, pp. 87–89.
[30] Defined by L.P.A. 1925, s. 205, as "'The Public Trustee' or a corporation either appointed by the court in any particular case to be a trustee or entitled by rules made under subsection (3) of section 4 of the Public Trustee Act 1906 to act as custodian trustee." See also L.P.(A.)A. 1926, s. 3.
[31] T.A. 1925, s. 14 (2); *post*, p. 344.

The Public Trustee is a special example of a trust corporation.[32] He may act as an ordinary trustee or as a custodian trustee.[33] A custodian trustee holds the trust property and the documents relating to it, while leaving to the managing trustees the day to day administration of the trust. The provisions of the Act relating to custodian trusteeship have been extended to any banking or insurance company or other body corporate entitled under the Public Trustee Rules to act as a custodian trustee.[34]

The advantage of the scheme of custodian trusteeship is that new managing trustees can be appointed without the necessity of undergoing the trouble and expense—which can be considerable in the case of a large trust—of vesting all the securities in the trust in new trustees whenever there is a death, retirement or new appointment. It should be noted that this advantage cannot be gained by appointing the holder of an office as trustee. If the chairman and secretary of a committee are trustees, the investments must be transferred to the names of the new holders of the office when a change is made. *Ex officio* trustees can only be effective in the case of a corporation sole.[35]

5. Disclaimer

Nobody can be compelled to accept the office of trustee against his will.[36] A person appointed as trustee who wishes to disclaim should do so by deed,[37] as this provides clear evidence of the disclaimer. However, a disclaimer may be implied; apathy will be evidence of an intention to disclaim, provided the apathy is consistent.[38] But if the trustee meddles with the estate, his conduct will be construed as an acceptance. Once he has disclaimed, he can no longer accept. Once he has accepted he can no longer disclaim[39]; but as we will see, he may retire.[40]

[32] Created by the Public Trustee Act 1906, which should be consulted for further details.

[33] Public Trustee Act 1906, s. 4; (1960) 24 Conv.(N.S.) 196 (S. G. Maurice); see *Forster* v. *Williams Deacon's Bank* [1935] Ch. 359.

[34] Public Trustee Act 1906, s. 4 (3); including the power to charge.

[35] Halsbury, Vol. 38, p. 816; *Tufnell* v. *Constable* (1838) 7 Ad. & E. 798; *Bankes* v. *Salisbury Diocesan Council of Education* [1960] Ch. 631 at pp. 647–649.

[36] A person can, of course, become a constructive or resulting trustee against his will.

[37] *Stacey* v. *Elph* (1833) 1 Myl. & K. 195, 199; *Re Schär* [1951] Ch. 280; *Holder* v. *Holder* [1968] Ch. 353 (an executor).

[38] *Re Clout and Frewer's Contract* [1924] 2 Ch. 230.

[39] *Re Sharman's W.T.* [1942] Ch. 311; *Holder* v. *Holder, supra.*

[40] *Post*, p. 306.

6. Number of Trustees

There is no restriction upon the number of trustees of personalty.[40a] It is inconvenient to have too many; and rare to have more than four. A single or sole trustee is most unsatisfactory because of the opportunities for maladministration and fraud which then arise.

In trusts of land, Trustee Act 1925, s. 34, restricts the number of trustees of a settlement or of a trust for sale to four. There are exceptions, the most important of which is that of land vested in trustees for charitable, ecclesiastical or public purposes.[41]

While a sole trustee of land is not forbidden,[42] the Trustee Act 1925, s. 14 (2), makes it impossible for a sole trustee (not being a trust corporation)[43] to give a valid receipt for the proceeds of sale or other capital money arising under a disposition on trust for sale of land, or capital money arising under the Settled Land Act 1925.[44]

7. Appointment of Trustees

A. The First Trustees

The first trustees will ordinarily be appointed by the settlor or testator in the deed or will creating the trust. Provided that the deed is effective to constitute the trust, or the disposition in the will is adequate to identify the testator's assets as trust assets, a trust will not fail for want of a trustee.

Trustees hold as joint tenants, and if one of several trustees dies, the survivors are the trustees. On the death of a sole trustee, his personal representatives become trustees. If he dies intestate, the trust estate will vest, pending the grant of administration, in the President of the Probate, Divorce and Admiralty Division.[45] If the trustees disclaim, the trust still subsists, save in the rare cases where the settlor or testator has himself made the validity of the trust dependent upon acceptance of office by particular trustees.[46] If all the nominated trustees predecease the testator in the case of a testamentary trust, the personal representatives of the testator will hold until such time as trustees are appointed.

B. Who May Appoint New Trustees

i. Express Power. The trust instrument may include an express power to appoint new trustees. This is unusual,[47] as most settlors

[40a] See however T.A. 1925, s. 36 (6), *post*, pp. 300–301.
[41] T.A. 1925, s. 34 (3) (*a*).
[42] *Re Myhill* [1928] Ch. 100.
[43] *Ante*, p. 295.
[44] L.P.A. 1925, s. 27 (2); L.P.(A.)A. 1926, Sched.; S.L.A. 1925, ss. 18 (1), 94, 95.
[45] A.E.A. 1925, s. 9.
[46] *Re Lysaght* [1966] Ch. 191; Nathan & Marshall, No. 58.
[47] It is usual however to select a person to exercise the statutory power; *post*, p. 299.

now think it sufficient to rely on the statutory power; where an express power is given, it is often reserved to the settlor. The extent of such power depends of course upon the construction of the particular instrument. The statutory power will be available in addition, unless contrary intention appears in the instrument.[48]

In *Cecil* v. *Langdon*,[49] an express power was given to the surviving or continuing trustees to appoint new trustees "in the place of" the original trustees or of trustees appointed under the power; but the consent of the tenant in possession was required. In 1872, a new set of trustees was appointed by the court. It was held that the requirement of consent no longer applied, as the trustees then to be appointed were not being appointed within the terms of the express power. The continuing trustees could appoint under the statutory power.

ii. The Statutory Power: Trustee Act 1925, s. 36 (1) (2).[50]

"(1) Where a trustee, either original or substituted, and whether appointed by the court or otherwise, is dead,[51] or remains out of the United Kingdom for more than twelve months,[52] or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him,[53] or refuses[54] or is unfit to act therein, or is incapable of acting therein,[55] or is an infant,[56] then, subject to the restrictions imposed by this Act on the number of trustees,—

(*a*) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or

(*b*) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees

[48] T.A. 1925, s. 69 (2).

[49] (1884) 28 Ch.D. 1; *Re Wheeler and De Rochow* [1896] 1 Ch. 315; *Re Sichel's Settlements* [1916] 1 Ch. 358.

[50] The statutory power does not apply to personal representatives (not being trustees): *Re Cockburn's W.T.* [1957] Ch. 438; Nathan & Marshall, No. 7; *Re King's W.T.* [1964] Ch. 542; *ante*, p. 92.

[51] See T.A. 1925, s. 36 (8), and *ante*, p. 297.

[52] The period must be continuous: *Re Walker* [1901] 1 Ch. 259; see also *Re Stoneham's S.T.* [1953] Ch. 59. T.A. 1925, s. 25, permits a trustee who intends to remain abroad for over one month to delegate his duties; *post*, p. 349.

[53] For retirement of a trustee, see *post*, p. 306.

[54] *Ante*, p. 296.

[55] "Unfit" has a wider meaning than "incapable." "Incapable" refers to personal incapacity, such as illness or mental disorder; see T.A. 1925, s. 36 (4). "Unfit" is more general, and an absconding bankrupt has been held to be "unfit" but not "incapable": *Re Roche* (1842) 2 Dr. & War. 287. There is some doubt about an enemy alien: *Re Sichel's Settlements* [1916] 1 Ch. 358; *Re May's W.T.* [1941] Ch. 109. See also subs. (3), providing that a corporation is "incapable" from the date of dissolution.

[56] L.P.A. 1925, ss. 1 (6), 20; *Re Parsons* [1940] Ch. 764.

or trustee for the time being, or the personal representatives of the last surviving or continuing trustee; may, by writing,[57] appoint one or more other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee so deceased remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, or being an infant, as aforesaid.

(2) Where a trustee has been removed[58] under a power contained in the instrument creating the trust, a new trustee or new trustees may be appointed in the place of the trustee who is removed, as if he were dead, or, in the case of a corporation, as if the corporation desired to be discharged from the trust, and the provisions of this section shall apply accordingly, but subject to the restrictions imposed by this Act on the number of trustees."

iii. Exercise of the Statutory Power. It is usual to appoint someone to exercise the statutory power.

(a) *By Persons Appointed under section* 36 (1) (*a*). If two or more persons are given power to exercise it jointly, the power is not, in the absence of a contrary intention, exercisable by the survivor. This is consistent with the usual rule relating to bare powers given to individuals.[59]

The power is usually given to individuals in simple terms: "The statutory power of appointing new trustees shall be exercised by. . . ."[60] Complications can arise if the power is subjected to conditions and limitations.

In *Re Wheeler and De Rochow*,[61] the settlor gave power to donees to appoint a new trustee if one of the existing trustees should be (*inter alia*) "incapable." One of the trustees was bankrupt, and absconded. This made him "unfit" but not "incapable."[62] The question was whether a new trustee should be appointed by the donees under section 36 (1) (*a*) or by the continuing trustees under section 36 (1) (*b*). It was held that the situation was not within the terms of the power given to the donees and that section 36 (1) (*b*) applied.

[57] See *post*, p. 302, and T.A. 1925, s. 40.
[58] *Post*, p. 307.
[59] *Re Harding* [1923] 1 Ch. 182; *Bersel Manufacturing Co. Ltd.* v. *Berry* [1968] 2 All E.R. 552; *ante*, p. 104; *contra* where the power is given to persons as trustees: T.A. 1925, s. 18 (1).
[60] See, *e.g.*, *Encyclopaedia of Forms and Precedents* (3rd ed.), Vol. 16, p. 567.
[61] [1896] 1 Ch. 315; followed reluctantly in *Re Sichel's Settlements* [1916] 1 Ch. 358; *cf. Re Brockbank* [1948] Ch. 206.
[62] *Re Roche* (1842) 2 Dr. & War. 287, *ante*, p. 298n.

(b) *By the Surviving or Continuing Trustees under section* 36 (1) (*b*). In the case of continuing trustees it is expressly provided by section 36 (8) that the provisions of section 36 "relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section." This provision enables a retiring sole trustee or a retiring group of trustees to appoint their successors. It raises the question, however, whether their participation is essential; whether an appointment in which they did not participate would be void. Such an objection failed in *Re Coates to Parsons*[63]; the retiring trustee is only included if it is shown that he is competent and willing to act. The concurrence of a trustee who is removed on the ground that he remained outside the United Kingdom for more than twelve months[64] is not required.[65] It is advisable, in order to avoid these difficulties, that refusing or retiring trustees should participate in the appointment of new trustees if possible, and this is the usual practice.

The power to appoint a new trustee can be exercised by the executor of a sole trustee appointed by will,[66] but not by the personal representative of the survivor of a body of trustees named in a will, who has died in the testator's lifetime, as the Act does not contemplate the case of all the trustees named in the will predeceasing the testator.[67] Nor can the sole surviving trustee exercise the power by his will, so as thereby to appoint new trustees in succession to himself.[68] The aim of the Act of 1925 is to ensure the making of an appointment in all events. The executors who have proved the will need not have the concurrence of those who have not proved or intend to renounce probate,[69] and even a sole or last surviving executor who intends to renounce probate can nevertheless fulfil this one function without thereby accepting the office of executor.[70]

(c) *Additional Trustees.* Before 1926 the statutory power of appointing new trustees only applied to the filling of vacancies. A broad power is given by section 36 (6), restricted only by the limitation to a total number of four trustees, and by the fact that the power is to appoint "another person or other persons" and that consequently (and unlike appointments under subsection (1)) the appointor may not appoint himself.[71] Section 36 (6) reads:

63 (1886) 34 Ch.D. 370.
64 *Ante*, p. 299.
65 *Re Stoneham* [1953] Ch. 59.
66 *Re Shafto's Trusts* (1885) 29 Ch.D. 247.
67 *Nicholson* v. *Field* [1893] 2 Ch. 511.
68 *Re Parker's Trusts* [1894] 1 Ch. 707.
69 T.A. 1925, s. 36 (4).
70 T.A. 1925, s. 36 (5).
71 *Re Power's S.T.* [1951] Ch. 1074.

"Where a sole trustee, other than a trust corporation, is or has been originally appointed to act in a trust, or where, in the case of any trust, there are not more than three trustees (none of them being a trust corporation) either original or substituted and whether appointed by the court or otherwise, then and in any such case—

(*a*) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or

(*b*) if there is no such person, or no such person able and willing to act, then the trustee or trustees for the time being;

may,[72] by writing, appoint another person or other persons to be an additional trustee or additional trustees, but it shall not be obligatory to appoint any additional trustee, unless the instrument, if any, creating the trust, or any statutory enactment provides to the contrary, nor shall the number of trustees be increased beyond four by virtue of any such appointment."

C. Appointment by the Court

i. Trustee Act 1925, s. 41.[73] Subsection (1) of section 41 provides: "The court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient difficult or impracticable so to do without the assistance of the court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.

In particular and without prejudice to the generality of the foregoing provision, the court may make an order appointing a new trustee in substitution for a trustee who is [incapable, by reason of mental disorder within the meaning of the Mental Health Act 1959, of exercising his functions as trustee] or is a bankrupt, or is a corporation which is in liquidation or has been dissolved."

ii. Circumstances in which the Jurisdiction will be Exercised. The section gives the court a discretion. Cases arise in a variety of circumstances, *e.g.*, where a sole surviving trustee has died intestate, and difficulty is experienced in obtaining administration of his estate[74]; or where the donee is incapable of making

[72] T.A. 1925, s. 37 (1) (*c*).

[73] This subsection is printed as amended by the Mental Health Act 1959, s. 149 (1), Sched. 7, and the Criminal Law Act 1967, s. 10, Sched. 3. The power does not apply to the appointment of personal representatives (s. 41 (4)).

an effective appointment because of infancy.[75] The court has power to displace a trustee against his will[76]; and also where the trustees were the life tenant and remainderman and there was friction between them[76]; or where a trustee has, through age or infirmity,[77] become incapable of acting, or who permanently resides abroad.[78]

The court should not however be asked to exercise this jurisdiction where the power under section 36 (1) can be exercised.[79] It has no jurisdiction to appoint a new trustee against the wishes of the persons who have the statutory power to appoint, even in a case where an application has been made to it by a majority of the beneficiaries.[80] The wishes of the beneficiaries in such a case can prevail if they are all *sui juris*, by terminating the trust and creating a new trust in which they will appoint the trustees.[81]

8. Vesting of the Trust Property in Trustees

A. Requirement of Vesting

The trust property must be vested in the trustees to enable them to deal with outside parties. Even in the absence of a proper vesting, however, a trustee, whether appointed under section 36 or by the court under section 41, has "the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust."[82]

B. Vesting Declaration under Section 40

i. Subsection (1). In order to obviate the necessity of a formal conveyance or other appropriate means of transfer of the trust property from the old trustees to the new, section 40 provides that the vesting may, with important exceptions, be effected by a vesting declaration, if the appointment of the trustees had been made by *deed*.[83] It does not apply, however, where the property is held by personal representatives and not by a trustee.[84]

Subsection (1) of section 40 provides:

[74] *Re Matthews* (1859) 26 Beav. 463.
[75] *Re Parsons* [1940] Ch. 973; (1941) 57 L.Q.R. 25 (R. E. M.).
[76] *Re Henderson* [1940] Ch. 764; Tiley, p. 268.
[77] *Re Lemann's Trust* (1883) 22 Ch.D. 633.
[78] *Re Bignold's S.T.* (1872) L.R. 7 Ch.App. 223.
[79] *Re Gibbon's Trusts* (1882) 30 W.R. 287; Nathan & Marshall, No. 81 (where, however, such an appointment was made); *cf. Re May's W.T.* [1941] Ch. 109.
[80] *Re Higginbottom* [1892] 3 Ch. 132.
[81] *Re Brockbank* [1948] Ch. 206.
[82] T.A. 1925, ss. 36 (7), 43.
[83] *Ante*, p. 297.
[84] *Re Cockburn's W.T.* [1957] Ch. 438; Nathan & Marshall, No. 7; *Re King's W.T.* [1964] Ch. 542; *ante*, p. 92.

"(1) Where by a deed a new trustee is appointed to perform any trust, then—

(*a*) if the deed contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover or receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become or are the trustees for performing the trust, the deed shall operate, without any conveyance or assignment, to vest in those persons as joint tenants and for the purposes of the trust the estate interest or right to which the declaration relates; and

(*b*) if the deed is made after the commencement of this Act and does not contain such a declaration, the deed shall, subject to any express provision to the contrary therein contained, operate as if it had contained such a declaration by the appointor extending to all the estates interests and rights with respect to which a declaration could have been made." [85]

ii. Exceptions under subsection (4). These in outline are:

(a) land mortgaged to secure money subject to the trust;

(b) land held under a lease which contains a covenant against assignment without consent, and the consent has not been obtained prior to the execution of the deed;

(c) stocks and shares.[86]

The non-application of the section to stocks and shares is a serious drawback, for this is the most important and valuable form of property in modern settlements. The provision, however, was necessary, because title to stocks and shares depends on the registration of the owners in the register of shareholders, and it is essential that the current trustees should be registered.

C. Vesting Orders under Sections 44 to 56

Sections 44 to 56 contain the rules as to vesting orders by the court. These overlap section 40, for vesting orders as to all kinds of property can be made, not only where the appointment has been made by the court, but also where it has been made out of court under an express or statutory power. The court is given wide powers to make such orders in a variety of eventualities, to which, *ex*

[85] See also L.R.A. 1925, s. 47, for provisions relating to registered land.

[86] "Any share, stock, annuity or property which is only transferable in books kept by a company or other body, or in manner directed by or under an Act of Parliament." It does not therefore include, for example, bearer bonds.

abundanti cautela, is added the case "Where land or any interest therein is vested in a trustee whether by way of mortgage or otherwise, and it appears to the court to be expedient" to make the order.[87]

9. Who May be Appointed Trustee

A. Capacity

Capacity to be a trustee is discussed at p. 295.

B. On Appointment by the Court under Section 41

The factors which a court will take into account when exercising its jurisdiction to appoint a trustee were discussed by Turner L.J. in *Re Tempest.*[88] The court should always have regard to three prime requirements: the wishes of the person by whom the trust was created; the interests, which may be conflicting, of *all* the beneficiaries; the efficient administration of the trust. It is important that the trustees act harmoniously together; but Turner L.J. thought it would be going too far to say that the court should refuse to appoint a particular trustee on the ground that the continuing trustee refused to act with him. That would give the continuing trustee a veto; rather, the reasons for the refusal should be examined to see whether the objection is well founded.

The court is reluctant to appoint a person who, though not himself interested, is related to, or connected with, someone who is. Thus a relative of one of the beneficiaries is not a desirable appointment[89]; nor is one nominated by a relative of the testator with whom the testator was on bad terms.[90] Again, the solicitor to the trust,[91] or to one of the beneficiaries[92] or trustees, should not be appointed, as there might be a conflict of duties; unless, of course, no other person can be found to undertake the position. If the solicitor to the trust is a continuing trustee, his partner should not be appointed.[93] Persons out of the jurisdiction should not be appointed[94] except in a case where circumstances require it, or where the beneficiaries are resident outside the jurisdiction also.[95]

[87] T.A. 1925, s. 44 (vii). [88] (1866) L.R. 1 Ch.App. 485; Nathan & Marshall, No. 82.
[89] *Wilding* v. *Bolder* (1855) 21 Beav. 222; *Re Parrott* (1881) 30 W.R. 97; *Re Coode* (1913) 108 L.T. 94; *Re Parsons* [1940] Ch. 973 (where an infant purported to appoint his mother).
[90] *Re Tempest* (1866) L.R. 1 Ch.App. 485; Nathan & Marshall, No. 82.
[91] *Wheelwright* v. *Walker* (1883) 23 Ch.D. 752; *Re Orde* (1883) 24 Ch.D. 271.
[92] *Re Kemp's S.E.* (1883) 24 Ch.D. 485; *Re Earl of Stamford* [1896] 1 Ch. 288; *Re Spencer's S.E.* [1903] 1 Ch. 75; *Re Cotter* [1915] 1 Ch. 307.
[93] *Re Norris* (1884) 27 Ch.D. 333.
[94] *Re Guibert's Trust Estate* (1852) 16 Jur. 852.
[95] *Re Simpson* [1897] 1 Ch. 256; *Re Seale's Marriage S.T.* [1961] Ch. 574; *Re Windeatt's W.T.* [1969] 1 W.L.R. 692.

Even where the trust can be more conveniently administered by trustees resident abroad, the court may exact an undertaking from them that they will consult the court before proceeding to the appointment of new trustees out of the jurisdiction.[96] Trusts administered abroad enjoy a number of fiscal advantages, and this has encouraged the movement of many trusts overseas.[97]

C. On Appointment under Express Power or under Section 36

i. By Donees of the Power. It is said that the above principles should guide persons exercising their power to appoint under section 36. In practice, however, it is common for beneficiaries and other members of the beneficiaries' families, and for solicitors to the beneficiaries, to be appointed. A conflict of interest and duty or of two duties should of course be avoided. However, even if the trustee appointed is one whom the court itself would not have selected, it seems that the court will do little to rectify it.[98]

ii. Foreign Trusts. A problem arises at the present time in relation to the tax advantages of foreign trusts over United Kingdom trusts.[99] Where a majority of the trustees are resident and ordinarily resident abroad, and the general administration of the trust is ordinarily carried on abroad, capital gains tax, where all or some of the beneficiaries are domiciled and either resident or ordinarily resident in the United Kingdom, is payable in respect of gains attributable to each beneficiary's interest.[1] In the case of a discretionary trust, where no beneficiary has an "interest," the tax is not payable until some property is distributed[2]; payment is thus delayed and not avoided. However, the delay is an advantage, and many settlors and beneficiaries desire to replace their United Kingdom resident trustees by other trustees or by a trust corporation which is resident in a tax haven overseas. This presents certain difficulties. A trustee may be reluctant to participate in an appointment which the court would not have been willing to make under section 41[3]; or to retire in favour of overseas trustees in case of personal liability in respect of estate duty[4] or income tax[5] after he has parted with the trust funds. The law on these matters is still in a stage of development.

96 *Re Freeman's S.T.* (1887) 37 Ch.D. 148.
97 But the courts have reservations: *Re Weston's Settlements* [1969] Ch. 223.
98 In *Re Norris* (1884) 27 Ch.D. 333, the funds were being administered by the court; in *Re Coode* (1913) 108 L.T. 94, an appointment of an infant was held void; *Re Parsons* [1940] Ch. 973; *Re Higginbottom* [1892] 3 Ch. 132.
99 Wheatcroft, *Capital Gains Taxes*, Chaps. 4 and 5.
1 F.A. 1965, s. 42 (2).
2 *Ante*, p. 187.
3 *Re Weston's Settlements*, *supra*.
4 F.A. 1894, s. 8 (4).
5 I.T.A. 1952, s. 412.

D. Choice of Trustees by the Settlor

The settlor is under no restrictions in the selection of the original trustees. It is of course in his interest to think long and hard before deciding on the persons to whom he will commit the administration of the trust. The question is not merely one of selecting efficient, businesslike and fair-minded trustees who will carry out their duties according to law. Modern settlements contain such wide discretionary powers that even the beneficial enjoyment of the fund is dependent upon the exercise of the trustees' discretion. The trustees therefore must be people who will be relied on to respect the wishes of the testator on matters on which they are in law virtually uncontrolled; and in circumstances which may have greatly changed since the trust was created.

10. Retirement: Section 39

A trustee may retire from a subsisting trust in any one of the three ways explained below.[6] Retirement means a discharge from further responsibility and liability under the trust. A trustee should not retire when faced with disputes among beneficiaries and leave them to settle their differences among themselves. If he retires in order to facilitate a breach of trust by his successors, he will remain liable.[7]

A. Under an Express Power in the Trust Instrument

This is rare, since (the predecessors of) sections 36 and 39 made express powers unnecessary.

B. Statutory Power

We saw that a trustee desiring to be discharged could be replaced by a newly appointed trustee.[8] He may retire, without being replaced, if he complies with section 39.

> "S. 39—(1) Where a trustee is desirous of being discharged from the trust, and after his discharge there will be either a trust corporation or at least two individuals to act as trustees to perform the trust, then, if such trustee as aforesaid by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge

6 A personal representative, on the other hand, cannot retire; *ante*, p. 92.
7 *Head* v. *Gould* [1898] 2 Ch. 250; Nathan & Marshall, No. 124.
8 T.A. 1925, s. 36 (1), *ante*, p. 298.

of the trustee, and to the vesting in the co-trustees alone of the trust property, the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place.

(2) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done."

C. Under an Order of the Court

The court will only discharge a trustee under its statutory jurisdiction where it replaces him by a new appointment under section 41. There is however an inherent power in the court to discharge him without replacement in the case of an action to administer the trust. While it will not, in the exercise of this jurisdiction, encourage capricious retirement,[9] it will allow a trustee to retire where it is entirely proper for him to do so.[10]

11. Removal

We have seen that the court may, on the appointment of a new trustee, remove an existing trustee.[11] It has also an inherent jurisdiction in actions for the administration of trusts to remove a trustee compulsorily; but the principles on which this power is exercised are somewhat vague.[12]

Actual misconduct on the part of a trustee need not be shown, but the court must be satisfied that his continuance in office would be prejudicial to the due performance of the trust, and so to the interests of the beneficiaries. The court has a clear ground for removal in cases where a trustee is ignoring one of his recognised duties. Thus, though it will not necessarily constitute an actual breach of trust for a trustee of a will carrying on the business of his testator to set up a rival business, yet it will be a ground for his removal,[13] as he has put himself in a position wherein his duty and interest are bound to be in conflict. And Harman J. has suggested that a member of a discretionary class could procure the removal of

[9] *Courtenay* v. *Courtenay* (1846) 3 Jo. & La T. 519 at p. 533.
[10] *Re Chetwynd's Settlement* [1902] 1 Ch. 692.
[11] T.A. 1925, ss. 36, 41; *ante*, pp. 299, 302; *Re Stoneham* [1953] Ch. 59; as to removal of a charitable trustee, see Charities Act 1960, s. 20; *ante*, p. 279.
[12] *Letterstedt* v. *Broers* (1884) 9 App.Cas. 371; Nathan & Marshall, No. 83; *Re Pauling's S.T. (No. 2)* [1963] Ch. 576.
[13] *Moore* v. *M'Glynn* [1896] 1 Ir.R. 74.

a trustee who "deliberately refused to consider any question" relating to the qualification of members to receive payments.[14]

In administration actions the powers of the court are very elastic.[15] The court can, at any time during such proceedings, remove the trustees, if it considers such removal necessary for the preservation of the trust estate or the welfare of the beneficiaries, notwithstanding that such removal has not been expressly asked for by the pleadings. But each case must be weighed carefully on its own merits; and the court will sometimes find it necessary to place in one scale a minor breach of trust, and in the other the certain expense to the trust estate of a change of trustees.[16]

12. Control of Trustees

The basic principle governing trustees is that, while duties must be discharged, the exercise of discretions needs only to be considered. The very fact of a discretion having been entrusted precludes the trustee from being obligated to exercise it in any particular matter, or indeed at all. Thus in *Tempest* v. *Lord Camoys*,[17] one trustee wished to take advantage of a power in a trust instrument to purchase land but his co-trustee would not agree. It could not be shown that he had failed to consider the matter, and the court refused to issue any directive to him.

Nor is there a general principle that trustees should consult beneficiaries, though they should inform them that they have certain rights.[18] Frequently consultation takes place as a matter of practice, but only occasionally does statute [19] impose an obligation on them to do so, and even then their wishes are not mandatory but must be related to the overall welfare of the trust.

But what is the position if trustees exercise a discretion in a manner that appears wholly unrealistic? Is it a satisfactory answer to state simply that the matter has been fully considered? The law on this subject is neither wholly clear nor wholly satisfactory.

[14] *Re Gestetner Settlement* [1953] Ch. 672 at p. 688; Nathan & Marshall, No. 10; *cf. I.R.C.* v. *Broadway Cottages Trust* [1955] Ch. 20 at p. 34, and *Gartside* v. *I.R.C.* [1968] A.C. 553.

[15] *Re Harrison's Settlement Trusts* [1965] 1 W.L.R. 1492.

[16] *Re Wrightson* [1908] 1 Ch. 789.

[17] (1882) 21 Ch.D. 571; Nathan & Marshall, No. 109; *cf. Gisborne* v. *Gisborne* (1877) 2 App.Cas. 300: *per* Lord Reid in *Re Gulbenkian's Settlements* [1968] 3 W.L.R. 1127 at p. 1131.

[18] *Hawkesley* v. *May* [1956] 1 Q.B. 304; *post*, p. 340.

[19] *e.g.*, statutory trusts arising under L.P.A. 1925; see *ibid.* s. 26 (3) as amended by the Schedule to the L.P.(A.)A. 1926, considered *post*, p. 522.

A. Where No Reasons are Given

There is a basic rule that trustees cannot be compelled to explain their reasons for exercising or not exercising a discretionary power.

In *Re Beloved Wilkes' Charity*,[20] trustees were directed to select a boy to be educated for Orders in the Church of England. Their freedom of choice was limited by a preference for certain parishes. Lord Truro refused, in the absence of any evidence that they had acted otherwise than fairly and honestly, to set aside a choice by the trustees of a boy who did not come from one of these parishes.

Nor would they be compelled to explain how they arrived at their conclusion.[21] No distinction exists in this context between oral and documentary evidence, which is a matter of some importance in view of the large amount of trust business which is now conducted by correspondence or at meetings with written agenda and minutes. In *Re Londonderry's Settlement*,[22] the court drew a sharp distinction between written material of this nature which related to management of the trust property (which should be disclosed to requesting beneficiaries) and material which related to the exercise of discretions (which need not be disclosed).

B. Where Reasons are Given

But if trustees do give reasons, then the courts will look into their adequacy.[23] The cases are not clear, however, on whether the courts will look into the exercise of a discretion that *appears* to be wholly unreasonable. If there is an allegation of fraud or misconduct, the courts must investigate it, but it is not clear what will happen if, on investigation, the discretion is shown to have been wrongly, but not fraudulently, exercised.[24] Some cases [25] in the nineteenth century reserve to the courts a jurisdiction to investigate the exercise of a discretion that has already been made and that, on external evidence only, appears to have been "mischievously and ruinously exercised." And Lord Normand, in a Scottish appeal to the House of Lords, thought that "The principles on which the courts must proceed are the same whether the trustees' reasons for their decision are disclosed

[20] (1851) 3 Mac. & G. 440.
[21] For a discussion on policy grounds, see (1965) 28 M.L.R. 220 (A. Samuels); (1965) S.J. 239 (A. J. Hawkins and F. W. Taylor).
[22] [1965] Ch. 918; Nathan & Marshall, No. 106; *post*, p. 339; *Butt* v. *Kelson* [1952] Ch. 197.
[23] *Klug* v. *Klug* [1918] 2 Ch. 67.
[24] See (1965) 81 L.Q.R. 192 (R.E.M.), and *post*, p. 340.
[25] See *Re Brittlebank* (1881) 30 W.R. 99. But the jurisdiction may be confined to the protection of trust assets. *Cf. Re D'Epinoix's Settlement* [1914] 1 Ch. 890.

or not,"[26] but it is not clear whether all the propositions in this case are acceptable as part of the English law of trusts. A conclusion can only be drawn in the form that it will never be easy to persuade a court to review the exercise of a discretion by trustees in the absence of some clear facts from which it is not difficult to discern that the discretion has been irregularly exercised.

C. Power of Decision

A trust deed occasionally gives to trustees a power to decide a particular matter conclusively, so that the jurisdiction of the courts to decide it is ousted. For instance in *Re Coxen*,[27] a testator provided that his wife should cease to enjoy a right to live in a particular house if the trustees were of the opinion that she had ceased to reside there permanently. The opinion of the trustees on this matter was held by the court to be the crucial factor. But the issue that they have to decide must be a reasonably clear one; unreasonably vague phrases are not to be given validity in this way.[28] And they cannot be given jurisdiction to determine conclusively the *identity* of beneficiaries as distinct from more limited issues such as where they live or whether, being institutions, they are under "state" control.[29] The House of Lords in *Dundee General Hospitals* v. *Walker*[30] thought it possible that the decisions of trustees in such cases could be attacked on the grounds of perversity or failure to appreciate the issue, as well as on grounds of bad faith.

The general principle that beneficiaries cannot control trustees in the manner in which they exercise their powers applies even though all the beneficiaries are ascertained and *sui juris* and desirous of the power being exercised in a particular way.[31] But in such a case the trust can of course be brought to an end.

[26] *Dundee General Hospitals* v. *Walker* [1952] 1 All E.R. 896 at p. 900. *Cf. Padfield* v. *Minister of Agriculture* [1968] 2 W.L.R. 924 at p. 944.

[27] [1948] Ch. 747 at p. 761. A complete or wide ouster of the court's jurisdiction is not possible; *Re Wynn* [1952] Ch. 271.

[28] *Re Jones* [1953] 1 All E.R. 357.

[29] *Re Raven* [1915] 1 Ch. 673; *Dundee General Hospitals* v. *Walker* [1952] 1 All E.R. 896. In the latter case, the ouster was held not to be excluded by the admixture of legal issues in the question of what constituted "state" control. But legal issues as such cannot be withdrawn from the court's jurisdiction.

[30] *Ibid.* See especially *per* Lord Reid at p. 905.

[31] *Re Brockbank* [1948] Ch. 206 (appointment of a new trustee); *ante*, p. 302; *cf. Re George Whichelow Ltd.* [1954] 1 W.L.R. 5 at p. 8.

Chapter 17

DUTIES OF TRUSTEES IN RELATION TO THE TRUST PROPERTY

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1. Duty to Collect in the Assets

A. Duty on Accepting Office

Trustees must, on their appointment, make themselves acquainted with the state and the details of the trust property, check that the trust fund is invested in accordance with the provisions of the trust deed, and that the securities are in proper custody. They should not wait until the trust property is formally vested in them. The discharge of their duties will obviously depend upon circumstances. Thus trustees of a trust newly constituted, and with suitable assets, are in an easier situation than personal representatives who find, as part of the estate, assets which are highly speculative or precarious. In the latter type of case the duty laid upon them is to consider the best method of protecting the value of the assets, and this may very well involve delaying a decision to dispose of them. Liability for loss will not be imposed on them if their decision to delay was reasonable, even though subsequent events show it to have been the less wise course.[1]

[1] *Buxton* v. *Buxton* (1835) 1 My. & Cr. 80.

A trustee appointed in place of a former trustee must make all reasonable inquiries [2] to satisfy himself that nothing has been done by his predecessor and the continuing trustees which amounts to a breach of trust; and the continuing trustees must provide this information from trust documents.[3] Omission to inquire may render the new trustee liable, but he is not to be fixed with notice of matters that do not appear on any of the trust documents, though the matter may be known to the retiring trustee.[4] On a similar principle, if he is ignorant of the existence of some right forming part of the trust, he is not liable for loss of that right through non-enforcement unless he could have discovered its existence from materials at his disposal.[5]

B. Extent of Duty

The duty to safeguard trust assets is a stringent one; indeed, it has sometimes been almost too stringently applied.

> In *Re Brogden*,[6] the trustees of a marriage settlement took what they considered to be all reasonable steps to ensure that a covenant to pay £10,000 to them at the end of a stated period of five years was carried out. They did not sue because the covenantor's estate was the basis of the family partnership, the stability of which might have been imperilled by an action at a time of trade depression. The trustees were held liable. They should have taken every possible step to insist on payment, irrespective of the claims of sentiment within a family.

As with family sentiment, so with the commercial ethics that would govern the transactions of a private vendor.

> In *Buttle* v. *Saunders*,[7] trustees had orally agreed to sell the freehold reversion of premises in London to the leaseholder. Then a beneficiary made a higher offer. The trustees declined to consider it, feeling themselves bound by commercial morality to complete the agreement. Wynn-Parry J. held that, although there may be cases where a trustee should accept a lower offer—as where that offer may be lost if not honoured—and although the honourable course was to stand by the earlier offer,

2 *Harvey* v. *Olliver* (1887) 57 L.T. 239; *Re Lucking's W.T.* [1968] 1 W.L.R. 866.
3 *Tiger* v. *Barclays Bank* [1951] 2 K.B. 556.
4 *Hallows* v. *Lloyd* (1888) 39 Ch.D. 686.
5 *Youde* v. *Cloud* (1874) L.R. 18 Eq. 634. A similarly reasonable rule governs the inquiries trustees should make in relation to covenants to settle after-acquired property: *Re Strahan* (1856) 8 De G.M. & G. 291.
6 (1888) 38 Ch.D. 546. An extreme case, when litigation would have ruined a beneficiary, is *Ward* v. *Ward* (1843) 2 H.L.C. 777n. (Lord Lyndhurst L.C.).
7 [1950] 2 All E.R. 193. *Cf. Re Rownson* (1885) 29 Ch.D. 358.

the trustees had an overriding duty to obtain the best price for their beneficiaries.

C. Litigation

In *Re Brogden*,[6] the Court of Appeal laid down that the only excuse for not taking action to enforce payment was a well-founded belief on the part of the trustees that such action would be fruitless; and the burden of proving their belief was on the trustees.[8] But the shoulders of trustees are lightened by the extensive powers of compounding liabilities, allowing time for the payment of debts, and compromising doubtful actions, etc., given by section 15 of the Trustee Act 1925. For trustees are not to be liable for loss caused by any acts done by them in good faith in exercise of these powers, provided they have directed their minds to the problem and not just let the matter slide.[9] A trustee will be allowed the costs of litigation by or against the trust from the trust assets, but not where the litigation results from an unreasonable withholding of property from those entitled to it,[10] nor where the litigation is speculative and turns out to be unsuccessful.[11]

D. A Continuing Duty

Trustees must of course regard their duty of safeguarding trust assets as a continuing one. In regard to investment in securities, the subject will fall to be treated at length. In regard to land, there is of course a duty to consider the maintenance and general welfare of the property, and in regard to deeds and chattels, a duty to see that they are kept securely.[12] These may be deposited with a bank or banking company whose business includes the safe custody of documents.[13] There is no duty to insure unless such a duty is imposed in the trust deed, but trustees have a power to insure.[14]

2. Duty to Invest

A. Meaning of Investment

A trustee is under a duty to invest trust money in his hands. To invest means "to employ money in the purchase of anything from which interest or profit is expected."[15] From the point of view

[8] *Re Brogden, supra*; *Clack* v. *Holland* (1854) 19 Beav. 262.
[9] *Re Greenwood* (1911) 105 L.T. 509. *Cf. Re Ezekiel's Settlements* [1942] Ch. 230.
[10] *Re Chapman* (1895) 72 L.T. 66.
[11] *Re Beddoe* [1893] 1 Ch. 547; *Re England's S.T.* [1918] 1 Ch. 24.
[12] *Jobson* v. *Palmer* [1893] 1 Ch. 71.
[13] T.A. 1925, s. 21.
[14] *Post*, p. 344.
[15] *Shorter Oxford English Dictionary.*

of an individual investing his own money, he does not mind whether the profit comes from income earned by the investment or from capital appreciation; probably he prefers the latter because the rates of tax are lower. But trustees usually have to consider the interests of a life tenant, who is entitled to the income, and also of the remaindermen who are interested in the capital. The trustees' duty is to act fairly between them. The investments must produce income, and maintain the capital. Thus a purchase of a house for occupation by a beneficiary, and which therefore produces no income, has been held not to be an investment.[16] It is for this reason that power is usually given expressly to trustees to make such a purchase.[17] Similarly investments which yield a high rate of income because the capital is wasting away—as with short leaseholds, or a loan which is dependent on the personal security of the borrower[18]—should be avoided. The law relating to authorised trustee investments is an attempt to give the trustees an area of choice within this principle. To what extent it succeeds can only be understood by an appreciation of some aspects of the economics of investment.

B. The Economics of Investment

In most general terms, there are basically two types of investment. First, a loan; the lender is entitled to the return of his money, with interest at an agreed rate for the use of his money. An unsecured loan depends on the solvency of the borrower; with a secured loan the lender can proceed against the property secured. A purchase of Government securities (gilt-edged) is essentially a loan, and the Government's solvency is such that the debt is secure. Similarly with loans to local authorities or to companies of high standing. Some overseas Governments of inferior financial standing are less safe, and are consequently lower priced. The rate of interest and the date of repayment are matters which vary with the particular loan. Some loans are repayable at a particular day; some are undated. A glance at a list of Stock Exchange fixed interest securities will show the variety of fixed interest investments available.

Once the loan has been offered by the Government and money lent by investors (or, which is the same thing, the stock purchased) the price of the stock will vary with several factors, the most im-

[16] *Re Power* [1947] Ch. 572; *Re Peczenik's S.T.* [1964] 1 W.L.R. 720; it is otherwise if land is purchased for the sake of the income it will produce; *Re Wragg* [1919] 2 Ch. 58 at pp. 64, 65.

[17] And is statutory in the case of settled land: S.L.A. 1925, s. 73 (1) (xi), and land held upon trust for sale, L.P.A. 1925, s. 28; *Re Wakeman* [1945] Ch. 177; *Re Wellsted's W.T.* [1949] Ch. 296; *post*, p. 520.

[18] *Khoo Tek Keong* v. *Ch'ng Joo Tuan Neoh* [1934] A.C. 529.

portant of which are the current rate of interest, and the economic or political instability of the borrower.[19] Interest rates have greatly increased in recent years. The yield of gilt-edged securities has varied from some 3 per cent. in 1946 to about 8 per cent. at the present time. The higher the interest rate, the lower the purchase price of the security. The fluctuations are within fairly narrow limits on the short term; and progress to ranges above the par value[20] of the security is limited by the fact that, with gilt-edged securities at least, the Government has the right to repay the loan either on giving notice (with undated stocks) or at a stated future time (with dated stocks).

Since interest rates have increased in recent years, the price of Government securities has declined. Further, the price is stated in pounds sterling; its price is a "paper" value; the "real" value of the pound sterling has decreased to one-half of its value in 1948.[21] The decline in real value of fixed interest securities over the past generation has been little short of disastrous; a trust which invested in fixed interest securities may have been reduced to a mere tenth of its previous value in real terms. Until 1961 trustees could invest only in fixed interest securities; the damage done to many private trusts, and especially to charities,[22] where wider powers were rarely available, can well be imagined.

The second form of investment which will be discussed here is the purchase of ordinary shares in commercial undertakings; or as it is commonly called, investment in "equities." The capital of a company is divided into shares. Some may be fixed interest preference shares but the bulk of the capital is usually in ordinary shares. The owner of ordinary shares is in a sense the owner of part of the undertaking of the company. If the company prospers, the value of his part will increase; and vice versa. The fear that beneficiaries under trusts would be dependent upon the commercial success of particular undertakings prevented ordinary shares from becoming trustee investments until 1961. They were classified as speculative. A number of factors however have led to a reversal of this view. An investor in ordinary shares is by no means certain to succeed; he may gain and he may lose. The investor in fixed interest securities is certain, with unchecked inflation, to lose in real terms. In fact, prudent investors in ordinary shares have made money in recent years. The price level of ordinary shares is measured by various indices of which the *Financial Times*

[19] Southern Rhodesian stocks have fluctuated for political reasons in recent years.
[20] *i.e.*, the nominal issue price.
[21] *Source*: Central Statistical Office, 1969.
[22] Most Oxford and Cambridge Colleges, and, no doubt other charities, took special statutory powers to enable them to invest in equities.

index is best known; this has increased from 100 in 1937 to about 400 at the time of writing. Expert and well advised investors have done much better; at least the *Financial Times* index has risen fast enough to keep pace with the fall in value of the pound sterling, and investments in ordinary shares have held their real value.

One difficulty with ordinary shares is that the income depends on the dividends declared by the company, and the dividend depends on the profits earned. These will vary from year to year, and the income of the life tenant may be seriously reduced if profits and dividends are low in times of economic depression. Further, the prices of ordinary shares vary with the opinion of investors generally as to the future prospects of the company. The brighter the future, the more popular the share, the higher the price, and the lower, consequently, the return. The average level of return from ordinary shares has declined in recent years, owing to the popularity of ordinary shares in inflationary times. Thus, if a trustee selected shares with bright future prospects, the present return is minimal. If he selects shares with a high return, the likelihood is that the long-range prospects of the company are poor. Thus it is very difficult to find good-quality ordinary shares at the present time with a return of as much as 5 per cent. The trustee is caught both ways. If he selects an investment with a high return, the maintenance of the value of the capital is at risk; if he seeks investment which will maintain the capital, the return is inadequate for the life tenants. This situation leads to the conclusion that the conflicting interests of life tenant and remainderman make it impossible for the trustees to pursue a satisfactory investment policy. A policy of sustained capital growth, where persons are interested successively under a trust, will be possible only if the traditional scheme of life tenant and remainderman were replaced by a scheme in which the trust provided, not for the income to be paid to the life tenant, but for an accumulation for the period allowed by the law, and for the life tenant to receive annually a share (say, 5 per cent.) of the capital. All concerned would then be interested in investment for capital growth.

C. Express Powers of Investment

A trustee may select investments permitted either by the general law, or by the express terms of the trust instrument. We will look later at investments authorised by law. At one time, these clauses were strictly construed, and it used to be that the onus was on the trustees to prove that they were within the terms of the clause.[23] These cases reflect the court's fear of investment in ordinary shares in the

[23] *Stretton* v. *Ashmall* (1854) 3 Drew. 9.

nineteenth century. There was "a good deal of authority . . . to the effect that investment clauses should be strictly construed and should not be construed as authorising investments outside the trustee range unless they clearly and unambiguously indicate an intention to that effect." [24] Thus it seemed to be established that words such as a power to invest in such securities "as they might think fit" [25] gave power merely to select among trustee securities. In *Re Harari's Settlement Trusts*,[26] Jenkins J., as we have seen, accepted the fact that the older cases suggested a strict construction of investment clauses, but felt that he was "left free to construe this settlement according to what I consider to be the natural and proper meaning of the words used in their context, and, so construing the words 'in or upon such investments as to them may seem fit' I see no justification in implying any restriction." [27]

The trustees could invest in equities. It remains the usual practice since, as well as before, the Trustee Investments Act 1961 to include a clause giving trustees wide powers in investment in respect of the whole of the fund and thus to exclude the Act. The Act, however, will still apply where the express power does not cover all the property in the trust fund.[28]

D. Authorised Investments

i. Trustee Investments Act 1961.[29] Authorised investments are now governed by the Trustee Investments Act 1961, which repeals and replaces the Trustee Act 1925, s. 1.[30] The Act applies subject to a contrary intention in an instrument made after the passing of the Act,[31] but regardless of the provisions of such instrument coming into operation previously. The object of the Act is to permit trustees to invest a proportion of trust funds in equities. The present permitted proportion is one-half,[32] but the Treasury has power by order to direct that this will be increased to any proportion not greater than three-quarters.[33] Since that time equity share values have risen by

[24] Jenkins J. in *Re Harari's S.T.* [1949] 1 All E.R. 430 at p. 432; Nathan & Marshall, No. 86; *Re Peczenik's Settlement* [1964] 1 W.L.R. 720.

[25] *Re Braithwaite* (1882) 21 Ch.D. 121; *Bethell* v. *Abraham* (1873) L.R. 17 Eq. 24; "as (to) the majority shall seem meet"; *Re Maryon-Wilson's Estate* [1912] 1 Ch. 55; in *Re Smith* [1896] 1 Ch. 71, Kekewich J. held that such a clause entitled the trustees to invest in debentures of a limited company.

[26] [1949] 1 All E.R. 430; Nathan & Marshall, No. 86.

[27] *Supra*, p. 434.

[28] *Post*, p. 320.

[29] (1961) 25 Conv.(N.S.) 372 (A. Samuels); for an American view, see [1954] C.L.P. 139 (V. Latham).

[30] T.I.A. 1961, s. 16, Sched. 5.

[31] *Ibid.* s. 1 (3); and subject to Acts of Parliament or an instrument made under an enactment.

[32] *Ibid.* s. 2.

[33] *Ibid.* s. 13 (1).

50 per cent., and the value of the pound has fallen by 23 per cent.[34] It is submitted that consideration should be given to the increase of the proportion which may be invested in equities.[35]

ii. The Scheme of the Act. Trustees who wish to take advantage of the wider powers of investment given by the Act must divide the fund into two parts, equal at the time of the division,[36] and called the narrower-range part and the wider-range part. In making the division, a valuation in writing from a person believed by the trustees to be qualified to make it is conclusive.[37] The normal procedure is to have a valuation made by a stockbroker. The division sets the two parts of the fund for all time, and there is no need to ensure that each half remains of the same value. Indeed no further transfers from one half to the other may be made without a "compensating transfer."[38] Later additions to the trust fund must similarly be equally divided between the two halves.[39]

iii. Narrower and Wider Range. The First Schedule gives a list of authorised investments.[40] Part I deals with narrower-range investments not requiring advice, Part II with narrower-range requiring advice[41]; these two parts deal with fixed interest investments and are a modern form of the Trustee Act 1925, s. 1. Part III contains wider-range investments, and includes ordinary shares in United Kingdom companies, shares in building societies, and unit trusts. No investment in any part is permitted where the holder can be required to accept payment of principal and interest otherwise than in sterling.[42]

iv. Restrictions on Wider Range. As we have seen, trustees may only invest in wider-range investments after the fund has been divided into two halves.[43] There are further requirements concerning ordinary shares[44]: (i) they must be quoted on a recognised U.K. stock exchange; (ii) they must be fully paid (or required by the terms of the issue to be fully paid up within nine months)[45]; (iii) the company

[34] As at the date of writing. Both figures are approximate. The figure for equity share values is obtained by using the Moodie Equity Price Index yearly average; the value of the pound from the Retail Price Index.

[35] This could have the effect of depressing the gilt-edged market still further; an unattractive proposition both for the Government and for the investor still holding such investments.

[36] T.I.A. 1961, s. 2 (1).

[37] *Ibid.* s. 5.

[38] *Ibid.* s. 2 (1) (*b*).

[39] *Ibid.* s. 2 (3) (*b*).

[40] Reprinted at Appx. "B."

[41] See *post*, p. 322.

[42] T.I.A. 1961, Sched. 1, Part IV, para. 1.

[43] *Ibid.* s. 2 (1).

[44] *Ibid.* Sched. 1, Part IV, paras. 2 and 3.

[45] These requirements apply also to many of the fixed interest securities. The object is to prevent purchases of shares which are subject to a call.

must have an issued capital of £1,000,000 or more [46]; (iv) the company must have paid a dividend in each of the immediately preceding five years on all of its shares ranking for dividend.[46]

E. Alterations to the Fund

i. Accruals. If property accrues to the trustee *as owner of property comprised in either part of the fund*, it shall be treated as belonging to that fund.[47] Thus a bonus issue of shares stays in wider-range; and a new issue of Government securities issued at the maturity [48] of a dated stock stays in narrower-range.

In every other case, however, the trustee must ensure, by apportionment of the accruing property or the transfer of property from one part of the fund to another, that the value of each part of the fund is increased by the same amount.[49] This is so, as we have seen, with additions to the trust fund [50]; similarly with a "rights issue," [51] because this comes to the trust fund by the purchase of the shares, and not by reason of the trustees' ownership of the original shares.

ii. Extraction. Where trustees take property out of the trust fund in the exercise of any power or duty, the property may be taken at the trustees' discretion from either part [52]; no compensating transfer is necessary. It appears that this rule applies where the property is taken permanently out of the fund, as where an advancement is made to a beneficiary,[53] or used to pay estate duty; and also where it is taken to form a separate fund, as for example to establish an accumulating fund for an infant beneficiary,[54] or to purchase a "special range" [55] investment under a special power. In any of these cases, the balance between the narrower- and wider-range parts will be disturbed; indeed it seems that the narrower-range part might be completely used up.

iii. Separate Funds. Where such a separate fund is set up out of a trust fund which has been divided into narrower-range and wider-range parts, then the separate fund (subject to the provisions for special range [55] investments) must be divided either equally, or so that the parts bear to each other the same proportion as the two

[46] These requirements apply also to debentures under T.I.A. 1961, Sched. 1, Part II (narrower-range with advice), para. 6.
[47] T.I.A. 1961, s. 2 (3).
[48] *i.e.*, when the date arrives at which a dated stock is repaid at par.
[49] T.I.A. 1961, s. 2 (3) (*b*).
[50] *Ante*, p. 318.
[51] The right, given to shareholders by a company wishing to raise additional capital, to subscribe for newly issued shares, usually at a favourable price.
[52] T.I.A. 1961, s. 2 (4).
[53] *Post*, p. 358.
[54] *Ante*, p. 190.
[55] *Post*, p. 320.

corresponding parts of the fund at the date of appropriation, or some intermediate proportion.[56]

For example, a £4,000 fund has been divided so that both parts were worth £2,000. The wider-range increased to £3,000; the narrower remained at £2,000. The trustees wish to establish a separate fund for a newly born beneficiary of £1,000. They may take this sum from the narrower-range. If they wish to use the investment powers of the Act in respect of the separate fund, they must divide it either £500 wider-range and £500 narrower-range, or £600-£400, or any intermediate proportion. The original fund will now of course be £3,000 and £1,000. If the trustees had decided to put £2,000 into the separate fund, and to take it all from the narrower-range part the narrower-range part of the original fund would have disappeared.

F. Special Powers and Special Range

i. The Second Schedule. The powers of investment conferred by the Act are in addition to express powers of investment or of postponing conversion. Such powers are referred to in the Act as "special powers."[57] A power to invest in any investment authorised by law for the investment of trust property conferred on a trustee before the passing of the Act has effect as a power to invest in accordance with the Act.[58] Where trustees are authorised, apart from the provisions of the Act or of a power to invest in authorised investments, to hold wider-range investments such investments are called "special range," and are dealt with in the Second Schedule.[59] Examples of "special range" property are investments held under express powers of investment, investments of capital moneys under the Settled Land Act 1925 or of the proceeds of sale of land held on trust for sale, investments made under a power contained in a court order under the Variation of Trusts Act 1958, and business assets held by a trustee who is empowered to postpone the sale of a family business. Such investments must be dealt with under the powers applicable to the specific case. Such powers may cover the whole trust fund. If however there are other holdings in the trust apart from such special range property, the Act applies to the remainder.[60] If the trustees then wish to exercise the investment powers under the Act, the trust funds must be divided into three parts; the special range, covering whatever part of the fund is so applicable, and the remainder divided equally between narrower- and wider-range.

[56] T.I.A. 1961, s. 4 (3).
[57] T.I.A. 1961, s. 3 (1).
[58] *Ibid.* s. 3 (2).
[59] *Ibid.* s. 3 (3).
[60] *Ibid.* Sched. 2, para. 2.

ii. Accruals and Disposals. Accruals of special range are added to the special range.[61] But any conversion *from* special range property must be apportioned equally between narrower- and wider-range,[62] or a compensating transfer made.

iii. Exceptions. The provisions of the Second Schedule do not apply however where the special powers of the trustee have been conferred or varied within ten years prior to the passing of the Act by an order of court or by an Act or statutory instrument relating specifically to the trust in question, or by a local Act of the same session as the 1961 Act.[63] The provisions of the Third Schedule then apply, which make no provision for special range property. The special powers may continue to be used; but the trustee may only use the powers of the 1961 Act to invest in wider-range investments if half of the fund is or becomes invested in narrower-range investments,[64] and trustees are no longer protected by Trustee Act 1925, s. 4, in respect of non-narrower-range investments which have become unauthorised by virtue of the Third Schedule.[65]

G. General Duty in Choosing Investments

Trustees are under a duty not only to ensure that the chosen investments are authorised, but also that they are properly selected for the trust in accordance with the standard of a prudent man of business. In making an investment for the benefit of persons for whom he felt morally bound to provide he must show more caution than a private investor who may well benefit from making wisely chosen speculations.[66] This is so, however wide a discretion he may be given by the trust instrument.[67] He must also consider the interests of the life tenant and remainderman, investing so as to provide a reasonable income, and to keep secure the capital.[68]

Additional difficulties arise when wider-range investments are introduced. Successful selection needs much more skill, knowledge and experience than do narrower-range investments. And by section 6 (1) the trustee is required to have regard both to the need for diversification of investments and to the suitability to the trust of the type of investment proposed, and of each particular investment as an investment of that description. Investment by trustees is now an

[61] *Ibid.* Sched. 2, para. 2 (2) (*b*).
[62] *Ibid.* Sched. 2, para. 3.
[63] *Ibid.* s. 3 (4).
[64] *Ibid.* Sched. 3, para. 1.
[65] *Ibid.* Sched. 3, para. 2.
[66] *Learoyd* v. *Whiteley* (1887) 12 App.Cas. 727, *ante*, p. 293.
[67] *Chapman* v. *Browne* [1902] 1 Ch. 785.
[68] *Post*, p. 328 *et seq.*

expert's job; and it is inevitable that the Act should require them to take expert advice.

H. Advice

Before making an investment in Part II or III of the First Schedule, a trustee must obtain and consider written advice [69] as to its suitability [70] from a person who is reasonably believed by the trustee to be qualified to advise. The trustee should not repose blind faith in his adviser; he must still use his own judgment as a man of business.[71] What he should do if his own judgment conflicts with the written advice is not clear.

I. Retention of Investments: Section 6 (3)

A trustee is required, in respect of investments for whose selection advice was required,[72] to determine at what intervals he should take advice on the question of retaining the investment.[73] The extent of this provision is not clear. It suggests that the trustee will be liable if loss occurs by reason of his failure to observe this requirement, or if he makes a determination in an unbusinesslike way. However, Trustee Act 1925, s. 4, is still in force and protects a trustee from liability for breach of trust " by reason only of his continuing to hold an investment which has ceased to be an investment authorised by the trust instrument or by the general law." It is submitted that a trustee who retains an unauthorised investment will be liable if he fails to consider the matter at proper times under advice; the protection of Trustee Act 1925, s. 4, only arises where the *sole* reason for the breach was the fact that the investment became unauthorised.

J. Mortgages of Land

i. The Security. The Act includes in the list of narrower-range investments requiring advice, " mortgages of freehold property in England and Wales or Northern Ireland and of leasehold property in those countries of which the unexpired term at the time of investment is not less than sixty years. . . ." [74] This replaces the provisions of the Trustee Act 1925 which gave trustees power to invest in " real securities." [75] A number of restrictions had been established in relation to investments in real securities, and the question arises whether they still apply to mortgages under the 1961 Act. On a strict

[69] T.I.A. 1961, s. 6 (2).
[70] Except in the case of a mortgage, *ibid.* s. 6 (7); T.A. 1925, s. 8 (1) (*c*).
[71] *Shaw* v. *Cates* [1909] 1 Ch. 389.
[72] *i.e.*, those in Parts II and III of Sched. I of the T.I.A. 1961.
[73] T.I.A. 1961, s. 6 (3); see *Rawsthorne* v. *Rowley* [1909] 1 Ch. 409n.; *Re Chapman* [1896] 2 Ch. 763.
[74] T.I.A. 1961, Sched. I, Part II, para. 13.
[75] T.A. 1925, s. 5 (1).

construction of the Act it appears that they do not. "Mortgage" unless the context otherwise requires, has the same meaning as in the Trustee Act 1925,[76] *i.e.*, ". . . every estate or interest regarded in equity as merely a security for money . . ."[77] Nothing in the 1961 Act appears to require a different construction, and it is arguable that the old restrictions no longer apply.

It would however be remarkable to sweep away these restrictions indirectly, and the safer view appears to be that the old rules still stand.[78] They established that trustees should lend money only as a first legal mortgage. Equitable mortgages[79] were unsatisfactory because of the danger of the appearance of a bona fide purchaser for value without notice. This remains a possibility today, unless the equitable mortgage is registered.[80] Second mortgages were not authorised.[81] Nor was a contributory mortgage[82]; for, in spite of their many advantages in widening the spread of risk and choice of security, the trustees, needing to co-operate with strangers, lost effective control. A sub-mortgage, on the other hand, is a perfectly proper form of security.[83]

ii. The Amount. Guidance to trustees as to the amount of money which should be advanced on mortgage is contained in Trustee Act 1925, s. 8.

> 8.—(1) A trustee lending money on the security of any property on which he can properly lend[84] shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, if it appears to the court—
>
> (*a*) that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere; and
>
> (*b*) that the amount of the loan does not exceed two third

[76] T.I.A. 1961, s. 17 (4).
[77] T.A. 1925, s. 68 (7).
[78] Lewin, p. 370, takes the view that the restrictions have gone.
[79] *Webb* v. *Ledsam* (1855) 1 K. & J. 385; *Swaffield* v. *Nelson* [1876] W.N. 255.
[80] *Post*, pp. 543, 590.
[81] *Chapman* v. *Browne* [1902] 1 Ch. 785 at p. 800.
[82] *i.e.*, a mortgage where several mortgagees joined; *Webb* v. *Jonas* (1888) 39 Ch.D. 660; *Re Massingberd's Settlement* (1890) 63 L.T. 296; *Re Dive* [1909] 1 Ch. 328.
[83] *Smethurst* v. *Hastings* (1885) 30 Ch.D. 490.
[84] See *Re Walker* (1890) 62 L.T. 449; *Shaw* v. *Cates* [1909] 1 Ch. 389.

parts of the value of the property as stated in the report; and

(*c*) that the loan was made under the advice of the surveyor or valuer expressed in the report.

The section is intended to give relief to trustees [85]; it does not deprive a trustee of the protection given by the pre-existing law.[86] It is important to take into consideration all relevant factors in determining a valuation for mortgage purposes. The current market value is not a sufficient guide, for example, in a situation in which there may be unusual fluctuations in value, connected perhaps with a business carried on there [87]; but a trustee "is justified in acting on expert advice not only as to the value of the property, but also as to the amount he may properly advance thereon . . . it being, of course, assumed that in giving the advice the expert will consider all the circumstances of the case, including the nature of the property, and will not advise a larger advance than under all the circumstances can be prudently made." [88] But the trustee, to obtain protection must comply strictly with the section. It is his responsibility to select the valuer,[89] who must be instructed and employed independently of the mortgagor [90]; and his report must be followed. Even then, the mortgage may for other reasons be improper. If wholly unauthorised, and a loss results, the offending trustee is liable for the whole loss. If the fault is only in respect of the amount of money lent, the mortgage is treated as a proper investment for the smaller sum; and the trustee is only liable to make good the excess.[91]

It is possible that a trustee who fails to comply with the provisions of section 8 will obtain relief under section 61.[92] Section 8 does, however, in the case of investment of trust funds on mortgage, "constitute a standard by which reasonable conduct is to be judged." [93] The trustee will not be liable where the value of the land has decreased through economic circumstances outside the trustee's control, and where the trustee has taken reasonable steps to safeguard the trust property.[94] Finally, trustees may, on a sale, leave on legal mortgage not more than two-thirds of the purchase price without having first obtained a report.[95]

85 *Palmer* v. *Emerson* [1911] 1 Ch. 758 at p. 769.
86 *Re Dive* [1909] 1 Ch. 328 at p. 342; *Shaw* v. *Cates*, *supra*, at p. 404.
87 *Learoyd* v. *Whiteley* (1887) 12 App.Cas. 727.
88 *Shaw* v. *Cates*, *supra*, at p. 398.
89 *Fry* v. *Tapson* (1884) 28 Ch.D. 268.
90 *Shaw* v. *Cates*, *supra*; *Re Stuart* [1897] 2 Ch. 583; *Re Solomon* [1912] 1 Ch. 261.
91 T.A. 1925, s. 9; *Shaw* v. *Cates* [1909] 1 Ch. 389; *Re Walker* (1890) 62 L.T. 449.
92 *Post*, p. 407.
93 *Re Stuart* [1897] 2 Ch. 583 at p. 592; *post*, p. 409.
94 *Re Chapman* [1896] 2 Ch. 763 (a case of retention while values were falling).
95 T.A. 1925, s. 10 (2).

3. Duty to Distribute. Satisfaction of Claims

A. Liability for Wrongful Payments

A trustee is obliged to make payments of income and capital as they become due, and to make them to the persons properly entitled. Failure to do so is a breach of trust, which the trustee must normally make good, such as for example, a payment based on a forged document,[96] or upon an erroneous construction of a document,[97] even if legal advice was taken.[98]

Where a trustee makes an overpayment of income or of instalments of capital, the error may be adjusted in later payments.[99] If the payment is to a person who is not entitled, the trustee's right of recovery is a quasi-contractual one, and the money will be recoverable if the mistake is one of fact, but not if it is a mistake of law.[1] An unpaid or underpaid beneficiary may, in addition to his right to sue the trustee, proceed against the property in the hands of the wrongly paid recipient not being a bona fide purchaser for value without notice.[2] A trustee-beneficiary who fails to pay himself in full has no remedy.[3]

B. Doubtful Claims

i. Application to Court for Directions. Where the trustees are in any doubt in relation to the claims of the beneficiaries, they should make an application to the court for directions; they will be protected if they obey the directions of the court.[4] This course can now be taken with a minimum of complication by the procedure of originating summons,[5] which avoids the earlier inconvenience whereby a suit for administration of the trust had first to be commenced.[6] In this way problems of construction of the trust instrument and difficulties in administering the trust can be brought before the court, so that the trustees are not forced to take upon themselves the risk of making decisions upon a false premise. The power of going to the court can also be helpful in cases where

96 *Eaves* v. *Hickson* (1861) 30 Beav. 136.
97 *Hilliard* v. *Fulford* (1876) 4 Ch.D. 389.
98 *National Trustees Company of Australasia Ltd.* v. *General Finance Company of Australasia Ltd.* [1905] A.C. 373.
99 *Dibbs* v. *Goren* (1849) 11 Beav. 483 (administration by the court); *Re Musgrave* [1916] 2 Ch. 417.
1 *Re Diplock* [1947] Ch. 716; the rule is different in respect of overpayment of unpaid legatees in the administration of a deceased's estate: *Ministry of Health* v. *Simpson* [1951] A.C. 251.
2 *Re Diplock* [1948] Ch. 465; Tiley, p. 349.
3 *Re Horne* [1905] 1 Ch. 76.
4 *Re Londonderry's Settlement* [1965] Ch. 918.
5 R.S.C., Ord. 85, r. 2, and Ord. 5, r. 4.
6 See *Re Medland* (1889) 41 Ch.D. 476.

the trustees are in difficulty in connection with the exercise of a discretion, for instance a discretionary power to make advancements. Trustees must not go to court just for their own convenience, and they are not able to surrender discretions *in toto* to the court.[7] Trustees or beneficiaries may, in suitable cases, apply for the trust to be administered by the court,[8] but an unsuccessful applicant may be liable for costs.

ii. Payment into Court. Where beneficiaries cannot be ascertained, or where for some exceptional reason trustees cannot obtain a good discharge from the trust, there is a residual power in trustees to pay the trust moneys into court.[9] But this will not be tolerated by the court as a means of trustees evading their obligations when difficulties arise.[10] It is a last resort when all other methods of dealing with the problem have proved unsuccessful. Trustees who pay trust funds into court when a different course was preferable, may be liable for costs.[11] The residue of the fund in *Re Gillingham Bus Disaster Fund*,[12] for instance, was eventually paid into court.

iii. "Benjamin" Order. The court has a power to authorise distribution of the whole of the assets of an estate, although not all the beneficiaries or creditors have made themselves known so as to be able to receive their share. The procedure is sometimes known as a "Benjamin order," and its purpose is to protect those distributing the assets[13]; if those entitled who have received nothing under the distribution eventually come forward to establish their claim, they may still be able to proceed against the property itself. Such an order will of course only be made after all practicable inquiries have been instituted.

iv. Distribution after Advertisement. Under the Trustee Act 1925, s. 27, trustees have themselves the power to advertise for claimants and, after compliance with certain formalities, the power to distribute the whole of their trust assets to claimants who have made themselves known.[14] But again, those who subsequently demonstrate an entitle-

[7] *Re Allen-Meyrick's W.T.* [1966] 1 W.L.R. 499; (1967) 31 Conv.(N.S.) 117 (A. J. Hawkins).

[8] R.S.C., Ord. 5, r. 1; (1968) 84 L.Q.R. 68 (A. J. Hawkins).

[9] Payment into court furnishes an exception to the rule that a majority of trustees cannot defeat a dissentient minority, for T.A. 1925, s. 63, provides that the payment may in certain circumstances be made by a majority of the trustees.

[10] See *Re Knight's Trust* (1859) 27 Beav. 45.

[11] *Re Cull's Trusts* (1875) L.R. 20 Eq. 561; (1968) 84 L.Q.R. 64 at pp. 65–67 (A. J. Hawkins).

[12] [1959] Ch. 62; Nathan & Marshall, No. 62; *ante*, p. 206.

[13] *Re Benjamin* [1902] 1 Ch. 723; *Re Gess* [1942] Ch. 37; *Re Taylor* [1969] 2 W.L.R. 1371.

[14] See *post*, p. 327.

ment are enabled to proceed against the property distributed, save when it is in the hands of a purchaser.[15]

v. Setting Aside a Fund. The Trustee Act 1925, s. 26, provides a procedure whereby trustees can set aside out of trust assets a sum to meet any potential liabilities, as under a lease for instance, and then to distribute the remainder of the trust assets to those entitled. Again, should the sum set aside prove insufficient, those entitled to the extra sums, may still follow the distributed property.

C. Relief under Section 61

A trustee who makes an erroneous distribution may be relieved from liability if he acted honestly and reasonably and ought fairly to be excused.[16]

D. Discharge

On the termination of the trust, the trustees should present their final accounts and obtain a discharge from the beneficiaries. If the beneficiaries are unwilling to give one, the trustees may apply to the court for the accounts to be taken and approved.[17]

[15] s. 27 (2) (*a*); and see *Re Aldhous* [1955] 1 W.L.R. 459.
[16] *Post*, p. 407.
[17] Underhill, Law of Trusts and Trustees (11th ed.), p. 527.

CHAPTER 18

DUTIES OF TRUSTEES IN RELATION TO THE BENEFICIARIES

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1. DUTY TO MAINTAIN EQUALITY BETWEEN THE BENEFICIARIES

A. Rule in Howe v. Earl of Dartmouth [1]

i. Life Tenant and Remainderman. We have seen that the rules governing investment by trustees are an attempt to strike a balance between the provision of income for the life tenant and the preservation of the capital for the remainderman.[2] So long as those rules are observed, a trustee is usually under no duty to rearrange the investments so as to balance equally the interests of the life tenant and remainderman.[3] Nor, if there are unauthorised investments in the fund, are the trustees under any duty to convert them into authorised

[1] (1943) 7 Conv.(N.S.) 128 and 191 (S. J. Bailey); (1952) 16 Conv.(N.S.) 349 (L. A. Sheridan).

[2] *Ante*, p. 314.

[3] "It is perhaps surprising that equity has not cast upon trustees, in every such case, a duty to convert the trust property as soon as practicable into something more likely to produce an equitable result." (1943) 7 Conv.(N.S.) 128 at p. 129 (S. J. Bailey); *Re Courtier* (1886) 34 Ch.D. 136; *Re Searle* [1900] 2 Ch. 829 at p. 834.

investments.[4] However the fund is invested, the normal rule is that the tenant for life takes all the income; the remainderman's interest is in the capital. The capital is not of course available until the life tenant's death; but he may, if he wishes, deal with or dispose of his reversionary interest in the fund.[5]

There are, as we will see, some situations in which there is a duty to convert into authorised investments; and that this duty carries with it a duty to apportion the income earned before the conversion is effected.

ii. The Duty to Convert. A duty to convert and re-invest in authorised investments may arise by reason of the existence of an express trust to sell or to convert, or by statute,[6] or, in the case of a bequest of residuary personalty, under the rule in *Howe* v. *Earl of Dartmouth*.[7]

(a) *Express Trust for Sale.* The trustees' duties under an express trust, of course, depend on the terms of the trust. It is important to note that an express trust to convert involves, as does a duty to convert under the rule in *Howe* v. *Earl of Dartmouth*,[7] an apportionment of the income pending conversion.[8] A mere power to sell is not sufficient to create a trust to convert.[9]

(b) *Rule in Howe* v. *Earl of Dartmouth.*[7] *Howe* v. *Earl of Dartmouth* establishes that, independently of any provision in the will, there is a duty to convert where residuary personalty is settled by will in favour of persons who are to enjoy it in succession. The trustees should convert all such parts of it as are of a wasting [10] or future or reversionary [11] nature or consist of unauthorised securities,[12] into property of a permanent or income-bearing character.

Thus property such as speculative investments,[13] royalties, copyrights,[14] etc., and (before 1926) leaseholds should be converted in

[4] But trustees who make investments should not select them in such a way as to benefit one beneficiary at the expense of others; *Raby* v. *Ridehalgh* (1855) 7 De G.M. & G. 104 at p. 109.

[5] This can be done through brokers who specialise in this field. A sale of a reversionary interest is usually unprofitable. The value, when it falls into possession, depends upon many unknown factors, including the progress of the investments in the meantime, and the impact of estate duty on the life tenant's death. These uncertainties lower the price.

[6] A.E.A. 1925, s. 33.

[7] (1802) 7 Ves.Jr. 137; Nathan & Marshall, No. 96.

[8] *Gibson* v. *Bott* (1802) 7 Ves.Jr. 89.

[9] *Re Pitcairn* [1896] 2 Ch. 199.

[10] Such as leases, which terminate after a period of time; or mines or ships which will eventually become worthless.

[11] *i.e.*, property which will only fall in after the death of the life tenant.

[12] *Ante*, p. 317.

[13] *Howe* v. *Earl of Dartmouth* (1802) 7 Ves.Jr. 137; Nathan & Marshall, No. 96.

[14] *Re Evans' W.T.* [1921] 2 Ch. 309; Nathan & Marshall, No. 98; *Re Sullivan* [1930] 1 Ch. 84; Tiley, p. 199.

the interest of the remainderman. For these are non-permanent investments, and may be of reduced or of no value at the life tenant's death. On the other hand, "future" property such as a remainder or reversionary interest, or other property which at present produces no income, is of no immediate benefit to the tenant for life. In his interest therefore it should be converted into income-bearing properties. And, as we shall see, provision is made for apportionment between the life tenant and remainderman of the value of such property when it falls into possession.[15]

It will be seen that, on its terms, the rule is of limited application. It does not apply to property settled *inter vivos*[16]; nor to specific as opposed to residuary bequests[17] (for the settlor's or testator's intention in such cases is for the specific property settled to be enjoyed successively). Nor does it apply to freehold[18] land, nor to leaseholds held for a term exceeding sixty years, for these are now authorised investments[19]; the question of its application to shorter leaseholds will be discussed later.[20]

iii. Apportionment. Where there is a duty to convert, whether under an express trust or under the rule in *Howe* v. *Earl of Dartmouth*,[21] there is, in the absence of an intention that the life tenant shall enjoy the income until sale, a duty also to apportion fairly between the life tenant and the remainderman the original property pending conversion. The detailed rules appear complicated at first sight; but they are simple and obvious if their purpose is understood.

(a) *Wasting, Hazardous or Unauthorised Investments.* It is assumed that wasting, hazardous and unauthorised securities produce income in excess of that which the life tenant should reasonably receive[22]; and does so at the expense of the security of the capital. With such property therefore the object of the apportionment rule is to provide that the life tenant receives an income which represents the current yield on authorised investments,[23] and that the excess is

15 *Re Earl of Chesterfield's Trusts* (1883) 24 Ch.D. 643; Nathan & Marshall, No. 103; *post*, pp. 331–332.
16 *Re Van Straubenzee* [1901] 2 Ch. 779.
17 *Ibid.* at p. 782.
18 *Re Searle* [1900] 2 Ch. 829. A power to postpone sale is implied in the case of every trust for sale of land unless a contrary intention is expressed: L.P.A. 1925, s. 25 (1) (3).
19 S.L.A. 1925, s. 73 (1) (xi).
20 *Post*, p. 334.
21 (1802) 7 Ves.Jr. 137; Nathan & Marshall, No. 96.
22 *Post*, p. 336.
23 The life tenant's income was fixed at 4 per cent. in *Re Baker* [1924] 2 Ch. 271, and applied at that figure in 1961 in *Re Berry* [1962] Ch. 97 at p. 113. However this is so far out of line with the current return from gilt-edged investments that it is difficult to see how it could now be supported. Trustees who have to decide what income to pay may be well advised to take instructions from the court.

added to capital.[24] If the interest received is less than 4 per cent., the balance should be made up out of subsequent income or from the proceeds of the unauthorised investments when sold.[25]

The question arises of the time at which the capital should be valued for the purpose of calculating the 4 per cent. income. A distinction must be made between cases where the trustees are given power to postpone conversion and those where they are not.

First: where there is no power to postpone. In this situation the trustees should convert within the "executor's year"[26]—the period during which the administration of the deceased's estate is expected to be completed. If the investments are sold within the year, the net proceeds of sale are taken as their value[27]; if not, these investments are valued *en bloc* as at the end of one year from the death.[28] In either case the life tenant is entitled as from the date of the death of the testator, to 4 per cent. on that sum.

Secondly: where the trustees postpone sale in the exercise of a power to postpone. The executor's year here has no relevance. There is a duty to convert, but no time within which the conversion should be effected. The date of the valuation is the date of the testator's death.[29]

In *Brown* v. *Gellatly*,[30] the estate consisted of (i) some ships (wasting assets) which the testator directed his executors to continue to use until they could be conveniently sold, and (ii) unauthorised securities. Both were retained for more than a year from the death. The question was whether, for the purpose of apportionment, the assets should be valued at the date of death or at a year from the death.

Lord Cairns held that the ships, being subject to a power to postpone sale, should be valued at the death; the unauthorised investments, on the other hand, a year from the death.

(b) *Future, Reversionary or other Non-Income Producing Property.* Where property which is subject to a duty to convert includes reversionary property, it is necessary, in the interest of the

[24] The life tenant will of course receive the income from the capital as thus increased.

[25] *Re Fawcett* [1940] Ch. 402.

[26] See *Williams on Executors and Administrators* (14th ed.), p. 778; A.E.A. 1925, s. 44.

[27] *Re Fawcett, supra.*

[28] *Dimes* v. *Scott* (1828) 4 Russ. 195.

[29] *Brown* v. *Gellatly* (1867) L.R. 2 Ch.App. 751 (the ships); *Re Owen* [1912] 1 Ch. 519; Nathan & Marshall, No. 101; *Re Parry* [1947] Ch. 23; Nathan & Marshall, No. 102; where Romer J. submitted the authorities to an exhaustive review; *Re Berry* [1962] Ch. 97.

[30] (1867) L.R. 2 Ch.App. 751.

life tenant, to provide for apportionment [31]; otherwise the life tenant would obtain no benefit from the property until it fell into possession. The reversion should be sold and the proceeds re-invested; until that is done there is no way of producing income for the life tenant. When it has been sold, there is still the problem of determining how much of the proceeds of sale should be apportioned to capital and how much to the life tenant. This is done by [32] ascertaining the sum "which, put out at 4 per cent. per annum . . . and accumulating at compound interest at that rate with yearly rests,[33] and deducting income tax at the standard rate, would, with the accumulation of interest, have produced, at the respective dates of receipt, the amounts actually received; and that the aggregate of the sums so ascertained ought to be treated as principal and be applied accordingly, and the residue should be treated as income." In other words, put a value on the reversion, on falling in, or on sale; that sum is part principal, part interest. The principal is the sum which, if invested at 4 per cent. at the date of the testator's death, would have produced the sum now received. The balance goes to the tenant for life.[34]

iv. Contrary Intention. All the rules above discussed are subject to a contrary intention by the testator or settlor.[35] A number of very fine points of construction arise; but the matter can only be discussed in outline here. The onus is on the person alleging that the equitable rules are excluded.[36]

(a) *Express Trust to Convert.* An express trust to convert normally carries with it the duty to apportion the income received

[31] The interest may be contingent: *Re Hobson* (1855) 55 L.J.Ch. 422. The rule also applies where the sum in question is itself a mixture of capital and income; *Re Chance's W.T.* [1962] Ch. 593 (compensation under the Town and Country Planning Act 1947); *Re Duke of Cleveland's Estate* [1895] 2 Ch. 542.

[32] *Re Earl of Chesterfield's Trusts* (1883) 24 Ch.D. 643.

[33] *i.e.*, the income is transferred to capital at the end of each year.

[34] The calculation can be made by taking the value of the reversion on sale or on falling in (£x), and working backwards year by year until the date of the testator's death. With the standard rate of income tax at 8s. 3d. in the £, the net income earned at 4 per cent. on £100 of capital is (£4 minus 4×8s. 3d.) £2 7s. The sum needed to produce £x after *one* year of investment can be found by applying the formula $\frac{£x \times £100}{£102\ 7s.}$, *i.e.* $£\frac{x \times 100}{102{\cdot}35}$. The application of this formula *to the sum* so calculated will produce the sums needed to produce £x after *two* years of investment. The calculation then needs to be continued back to the date of the testator's death. See Chandler's *Trust Accounts* (6th ed.), pp. 117–118; Bailey, *Law of Wills* (6th ed.), p. 128; Parker and Mellows, *Modern Law of Trusts*, pp. 276–277.
For a different method of calculation, see Rowland's *Trust Accounts* (3rd ed.), p. 95 *et seq.*

[35] *Hinves* v. *Hinves* (1844) 3 Hare 609; *Alcock* v. *Sloper* (1833) 2 Myl. & K. 699; Nathan & Marshall, No. 97; *Re Pitcairn* [1896] 2 Ch. 199; Nathan & Marshall, No. 99.

[36] *Per* James L.J. in *MacDonald* v. *Irvine* (1878) 8 Ch.D. 101 at p. 124; *per* Leach M.R. in *Alcock* v. *Sloper, supra.*

pending conversion.[37] There is no question in this situation of a contrary intention with regard to conversion; but there may be a contrary intention with regard to apportionment. This will arise where there is an indication of intention that, although the property should be converted, the life tenant is to enjoy the whole income produced by it pending conversion.

Such an intention is commonly indicated by the inclusion of a provision to effect that " the income of so much of the residue as for the time being shall remain unsold, shall be applied as if the same were income arising from investments of the proceeds of sale thereof." [38]

It may of course be indicated in other ways. The question depends upon the construction of the particular instrument. A power in the trustees to postpone a sale in their discretion is not a sufficient indication. Such a provision does not entitle the life tenant to the income produced by unauthorised investments.[39]

(b) *No Express Trust to Convert.* Here it is necessary to examine two constructional questions: whether the will indicates an intention to prevent conversion; or to permit the life tenant to retain the whole income. Either such intent will be sufficient to exclude apportionment.

> In *Gray* v. *Siggers* [40] the trustees were given power to retain any portion of the testator's property in the same state in which it should be at his decease, or to sell and convert the same *as they should in their absolute discretion think fit*. Such a power excluded the duty to convert.

An indication that the life tenant is to enjoy the whole income of the property also prevents apportionment and has the effect of negativing the duty to convert.[41] It may also have the effect of authorising the investments; or of making into settled land what would otherwise be held on trust for sale.[42] A power to retain investments or to postpone conversion is thus more likely to exclude the duty to convert and to apportion in cases where there is no express trust to convert. But it may be so framed that it is intended

[37] *Gibson* v. *Bott* (1802) 7 Ves.Jr. 89.
[38] Key & Elphinstone, *Precedents in Conveyancing* (15th ed.), Vol. 2, pp. 926–928; (1943) 7 Conv.(N.S.) 128 (S. J. Bailey).
[39] *Re Chaytor* [1905] 1 Ch. 233; Nathan & Marshall, No. 100; *Re Slater* (1915) 85 L.J.Ch. 432; Tiley, p. 211; *Re Berry* [1962] Ch. 97; and other cases quoted in Nathan & Marshall, p. 408 *et seq.*
[40] (1880) 15 Ch.D. 74; *Alcock* v. *Sloper* (1833) 2 Myl. & K. 699; Nathan & Marshall, No. 97; *Re Pitcairn* [1896] 2 Ch. 199; Nathan & Marshall, No. 99; *Pickering* v. *Pickering* (1839) 4 Myl. & Cr. 289; *Re Nicholson* [1909] 2 Ch. 111.
[41] *Alcock* v. *Sloper*, *supra*; *cf. Re Evans' W.T.* [1921] 2 Ch. 309; Nathan & Marshall, No. 98; *Re Gough* [1957] Ch. 323.
[42] *Re Gough*, *supra*.

to do no more than allow a suitable time to be selected for the sale.[43] It will then neither prevent conversion nor apportionment.

(c) *Reversionary Interests.* Similarly, the rule in *Re Earl of Chesterfield's Trusts*[44] may be excluded where such intention is manifested.[45] A clause expressly excluding the rule in *Howe* v. *Earl of Dartmouth*[46] usually operates to exclude the rule in *Re Earl of Chesterfield's Trusts* also[47]; but it is the general practice to add a special clause for this purpose.

It was laid down in *Rowlls* v. *Bebb*[48] that even if the rule is excluded by a clause in the will, it will nevertheless operate unless it can be shown that the trustees have, when they refrained from selling, a clear perception that they were exercising a discretionary power. It is not enough that they did not appreciate the necessity of selling a particular asset. There can be no such thing as an unconscious exercise of a discretion.[49]

v. Leaseholds. The rule in *Howe* v. *Earl of Dartmouth*[50] applied before 1926 to leaseholds; it is generally thought that it no longer applies. Leases with over sixty years to run are now authorised investments, so there can be no question of application to leases of that length.[51]

With shorter leases, the question depends on Law of Property Act 1925, s. 28, and *Re Brooker*.[52] This was a case of an *express* trust for sale of leaseholds, and the question was whether the tenants for life were entitled to the income *in specie*. It was held that they were. Section 28 (2) provides that "Subject to any direction to the contrary in the disposition on trust for sale or in the settlement of the proceeds of sale, the net rents and profits of the land until sale . . . shall be paid or applied . . . in like manner as the income of investments representing the purchase money would be payable or applicable if a sale had been made and the proceeds had been duly invested." And, by subsection (5), the section "applies to dispositions on trust for sale coming into operation either before or after the commencement or by virtue of this Act." "Land" in section 205 includes "land of any tenure," and the tenant for life was thus

[43] As with the ships in *Brown* v. *Gellatly* (1867) L.R. 2 Ch.App. 751.
[44] (1883) 24 Ch.D. 643; Nathan & Marshall, No. 103, *ante*, p. 332.
[45] *Re Pitcairn* [1896] 2 Ch. 199; Nathan & Marshall, No. 99.
[46] (1802) 7 Ves.Jr. 137; Nathan & Marshall, No. 96.
[47] See *Rowlls* v. *Bebb* [1900] 2 Ch. 107.
[48] [1900] 2 Ch. 107 (a case of a reversion).
[49] This principle was applied in *Re Fisher* [1943] Ch. 377 (a case of intestacy) and in *Re Hey's Settlement Trusts* [1945] Ch. 294.
[50] (1802) 7 Ves.Jr. 137; Nathan & Marshall, No. 96; *ante*, p. 329.
[51] S.L.A. 1925, s. 73; L.P.A. 1925, s. 28; *Re Gough* [1957] Ch. 323.
[52] [1926] W.N. 93; Nathan & Marshall, No. 105.

entitled to the whole income, as a tenant for life of freeholds would have been.

Does the rule in *Howe* v. *Earl of Dartmouth* [53] apply to residuary leaseholds where there is *no express* trust to convert? Certainly, *Re Brooker* [54] does not cover the precise point, for that was a case of an express trust, and the rule in *Howe* v. *Earl of Dartmouth* [53] is therefore irrelevant. If the rule applies so as to create an implied trust to convert, would the rule of apportionment apply also? If section 28 applies there will be no apportionment. It is arguable [55] that the section does not apply, because a residuary bequest which includes leaseholds is not strictly a "disposition on trust for sale." It is a "disposition" within that term as defined in section 205 as including "a bequest . . . of property contained in a will"; but it is not, so it is argued, a disposition on trust for sale, for the trust for sale is imposed, not by the disposition, but by the rule in *Howe* v. *Earl of Dartmouth*.[56] However, it would be most inconvenient to differentiate between express [57] or statutory trusts for sale,[58] where there is no apportionment, and implied trusts for sale. The better view is that the tenant for life is entitled to the whole income from leaseholds; and this is in accordance with the view of Tomlin J. who said in *Re Trollope*,[59] "so far as leaseholds held in trust for sale are concerned, the rule of *Howe* v. *Earl of Dartmouth* [56] is gone."

vi. Howe v. Earl of Dartmouth Today.[60] The rules relating to conversion and apportionment demonstrate basic principles of equity. But they should be understood in their proper perspective.

(a) *Exclusion of Duty to Apportion.* The duty to apportion is in practice nearly always excluded, both in respect of income from unauthorised securities and in respect of reversionary interests. The duty to convert, where it exists, thus appears in the context of a duty to change the investments.

(b) *Trustee Investments Act* 1961. Authorised securities now mean those investments which are authorised by the Trustee Investments Act 1961. It should be noted that wider-range securities and narrower-range requiring advice are only authorised when advice to retain them has been received. Presumably, therefore, "if sale and reinvestment are recommended the rule [in *Howe* v. *Earl of Dartmouth*] continues to apply until such sale" [61]

[53] (1802) 7 Ves.Jr. 137.
[54] [1926] W.N. 93.
[55] See (1930–32) 4 C.L.J. 357 (S. J. Bailey); Nathan & Marshall, pp. 417–418.
[56] *Supra.*
[57] *Re Brooker, supra.*
[58] *Re Berton* [1939] Ch. 200 (a gift of land to be held in undivided shares).
[59] [1927] 1 Ch. 596 at p. 601.
[60] (1952) 16 Conv.(N.S.) 349 (L. A. Sheridan).
[61] Nathan & Marshall, p. 406.

(c) *Paradoxical Effect of Current Investment Situation.* In the investment context of the present day, the rules of conversion and apportionment are in some way misplaced. The problem still exists of speculative and wasting securities. But the rule requires unauthorised investments, in the form of equities (other than those authorised by Trustee Investments Act 1961) to be sold in order to protect the capital for the benefit of the remainderman; and it deprives the life tenant of the high income which is supposedly earned by them. In fact, it is only by investment in equities that the value of the capital can be maintained; and for some six years now the average yield from fixed interest stocks has been higher than that from equities. The positions are therefore reversed. The life tenant now wants fixed interest investments in order to provide a high income; the remainderman wants unauthorised securities for the preservation of the real value of the capital. And it is the life tenant who will be pressing the trustees to convert urgently into gilt-edged securities; for they bring an income of approximately eight per cent. in the place of the mere four per cent. allowed to the life tenant by the rule of apportionment.

B. Other Methods of Apportionment

i. General. Questions of apportionment may arise in other ways. The basic rule applicable is that of the Apportionment Act 1870, s. 2, that "all rents, annuities, dividends, and other periodical payments in the nature of income . . . shall . . . be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

ii. Death of Testator. The way in which this matter arises in respect of dividends declared after the testator's death is explained in Chapter 23.

iii. Death of Life Tenant. A similar problem arises in the case of successive interests with regard to dividends declared after the death of the life tenant. Generally these will be apportioned between life tenant and remainderman on a day to day basis in relation to the number of days of the period covered by the dividend in which the life tenant was alive.

iv. Apportionment of Subject-Matter. Questions also arise between the life tenant and remainderman in relation to certain payments. Income is paid to the life tenant; capital moneys must be added to capital and invested. Sometimes it is not clear into which category a payment belongs; or it may be that a payment is partly income and partly capital. The question of entitlement between

life tenant and remainderman and that of liability of the payment to income tax are related questions, but are not indentical.[62] The tax aspect is the reason for the attraction to shareholders generally of distributions as capital.

A company may only make a distribution of its capital to the shareholders in certain circumstances, such as liquidation,[63] or on an unauthorised reduction of capital,[64] or on an authorised distribution from the share premium account.[65] A company however has power to increase its capital[66]; this may be done by capitalising profits and applying the money in paying up new shares which are distributed, as capital, to the shareholder.[67] Other payments to shareholders will be income payments; and the fact that the company calls a payment one of capital does not make it one.[68]

Where however the company has taken proper steps to capitalise profits, the company effectively determines the nature of the payment as capital. The leading case is *Bouch* v. *Sproule*,[69] where a bonus dividend, declared out of accumulated (and capitalised) profits, and applied in the purchase of new shares, was held to be a distribution of capital.

Treatment of such bonus issues of shares as capital is reasonable. The capitalised profits may or may not have arisen from undistributed trading profits; but the price of the shares when purchased will have reflected the existence of the sums in the reserve fund. The distribution of bonus shares looks like a "present" to shareholders. It is however merely a division of the company's assets among more shares. If a bonus issue is made of one new share for every one held, the assets of the company are divided among twice the number of shares, and the share price is immediately halved.

If a "rights" issue is made, the company offers to its shareholders the right to purchase newly issued shares at an advantageous price. The "rights" therefore have value. The purchase is purely a capital transaction, and trustees wishing to take up the shares should sell sufficient of the "rights" to produce enough money to purchase the shares available to the "rights" they retain.

[62] *Re Bates* [1928] Ch. 682; *Hill* v. *Permanent Trustee Co. of N.S.W.* [1930] A.C. 720; Tiley, p. 278; *Re Doughty* [1947] Ch. 263; *Re Sechiari* [1950] 1 All E.R. 417.
[63] *Re Armitage* [1893] 3 Ch. 337.
[64] Approved by the Court: Companies Act 1948, s. 68.
[65] *Re Duff's Settlements* [1951] Ch. 923.
[66] Under power in the Articles: Companies Act 1948, s. 61.
[67] *Bouch* v. *Sproule* (1887) 12 App.Cas. 385.
[68] *Hill* v. *Permanent Trustee Co. of N.S.W.* [1930] A.C. 720; Tiley, p. 278.
[69] *Supra.*

2. Duty to Provide Accounts and Information

A. Accounts

i. Extent of Duty. A trustee must keep accounts and be constantly ready to produce them for the beneficiaries.[70] It seems that a beneficiary is entitled only to see and inspect the accounts; if he wants a copy himself, he must pay for it; but it is common practice to provide a copy for each of the beneficiaries.[71] An income beneficiary is entitled to full accounts, but a remainderman is entitled only to such information as relates to capital transactions.[72] Accounts are often produced in simplified form in order to be comprehensible to the beneficiaries.

ii. Audit. It is neither necessary nor, except in large and complicated trusts or where trouble with a beneficiary is foreseen, usual to have trust accounts audited. However, trustees may, in their absolute discretion, have the trust accounts examined and audited by an independent accountant, and may pay the costs out of income or capital.[73] Audit should not be effected more than once in every three years, except in special cases.[73]

Any trustee or beneficiary may apply for the accounts of any trust to be investigated and audited by such solicitor or public accountant as may be agreed upon, or in default of agreement by the Public Trustee or by some person appointed by him.[74] Such an investigation however may not, except with the leave of the court, take place within twelve months of a previous such investigation. The costs are usually borne by the trust, but the Public Trustee may order that the applicant or the trustees must pay them or share them.[75] An appeal against a decision of the Public Trustee lies to a Judge of the Chancery Division.[76]

B. Information. Trust Documents

i. Information for Beneficiaries. The beneficiaries are entitled to be informed about matters currently affecting the trust. In order to have a ready supply of up-to-date information, the trustees should keep a trust diary or Minute Book which will record decisions and events affecting the trust. And a large trust will keep many other documents, such as the minutes of trustees' meetings. Documents connected with the trust are trust documents, and prima

[70] *Pearse* v. *Green* (1819) 1 Jac. & W. 135, *per* Plumer M.R. at p. 140.
[71] *Ottley* v. *Gilby* (1845) 8 Beav. 602; *Kemp* v. *Burn* (1863) 4 Giff. 348; *Re Watson* (1904) 49 S.J. 54.
[72] Mellows, *The Trustee's Handbook*, p. 36.
[73] T.A. 1925, s. 22 (4).
[74] Public Trustee Act 1906, s. 13; Public Trustee Rules, 31–37.
[75] See *Re Oddy* [1911] 1 Ch. 532.
[76] Public Trustee Act 1906, s. 10.

facie the property of the beneficiaries, and as such open to their inspection.[77]

On the other hand, a trustee's powers and discretions are not open to challenge if he has exercised them bona fide.[78] Further "trustees exercising a discretionary power are not bound to disclose to their beneficiaries the reasons actuating them in coming to a decision."[79] These principles come into conflict where, in the trust records or correspondence relating to the exercise of discretions, confidential matters are discussed and reasons given for them. Are the beneficiaries entitled to see the documents?

> In *Re Londonderry's Settlement*,[80] the donees of a power under a discretionary trust decided to distribute the capital. One member of the discretionary class was dissatisfied with the sum which they intended to give her. She asked for copies of the minutes of trustees' meetings, documents prepared for the meetings, and correspondence between various interested persons. The trustees were willing only to show her documents giving the intended distributions and the annual trust accounts. They declined, in the general interest of the family, to disclose further documents, and brought a summons to determine the nature and extent of their duties in relation to disclosures.
>
> The Court of Appeal found great difficulty in defining in general terms what were the "trust documents" which a beneficiary prima facie had a right to see. Salmon L.J. said that the category of trust documents could not be defined. They have however[81] "these characteristics in common (1) they are documents in the possession of the trustees as trustees (2) they contain information about the trust, which the beneficiaries are entitled to know (3) the beneficiaries have a proprietary interest in the documents and, accordingly, are entitled to see them." Documents connected with the trust may contain confidential information disclosure of which "might cause infinite trouble in the family, out of all proportion to the benefit which might be received from the inspection of the same . . . Where trustees are given discretionary trusts which involve a decision upon matters between beneficiaries, viewing the merits and other rights to benefit under such a trust, the trustees are given a confidential role and they cannot properly exercise that confidential role if at any moment

[77] *O'Rourke* v. *Darbishire* [1920] A.C. 581 at pp. 619, 626.
[78] *Re Beloved Wilkes' Charity* (1851) 3 Mac. & G. 440; *Klug* v. *Klug* [1918] 2 Ch. 67; *Re Gresham Life Assurance Society, ex p. Penney* (1872) L.R. 8 Ch.App. 446; *ante*, pp. 308–310.
[79] *Per* Harman L.J. in *Re Londonderry's Settlement*, *infra*, at p. 928.
[80] [1965] Ch. 918; Nathan & Marshall, No. 106.
[81] *Ibid.* at p. 938.

there is likely to be an investigation for the purpose of seeing whether they have exercised their discretion in the best possible manner. Of course, if a case is made of lack of bona fides, that is an entirely different matter." [82]

But it is one of extreme difficulty. If a beneficiary suspects that trustees' discretionary decisions have been made from wrong motives, it may only be possible to establish this by examining the documents. Such an allegation may be an effective way of obtaining information, otherwise denied. It is likely, however, that it would be dealt with by the exercise of a right to discovery after the action was started. Indeed the final order made in the *Londonderry* case was without prejudice to the right of the defendant to discovery in separate proceedings against the trustees.[83]

A trustee's duty is not merely one of answering questions; but also to provide beneficiaries with information concerning their interests under the trust; or, in the case of an infant beneficiary, to inform him of his entitlement on coming of age.[84] Executors are under no such positive duty, as a will is a public document.[85]

ii. Successor Trustees and Third Parties. As has been seen, trustees must provide information concerning the trust to a new or successor trustee [86]; and, by Law of Property Act, s. 137 (8), they must produce to any person interested a written notice which they may have received of dealings [87] with equitable interests in the trust property.

82 *Ibid. per* Danckwerts L.J. at pp. 935–936. Salmon L.J. said at p. 938: "If any parts of a document contain information which the beneficiaries are not entitled to know, I doubt whether such parts can truly be said to be integral parts of a trust document."

83 *Ibid.* at p. 939.

84 *Hawkesley* v. *May* [1956] 1 Q.B. 304.

85 *Re Lewis* [1904] 2 Ch. 656; *Re Mackay* [1906] 1 Ch. 25.

86 *Tiger* v. *Barclays Bank* [1951] 2 K.B. 556; *ante*, p. 312.

87 *e.g.*, mortgages, charges or sales.

CHAPTER 19

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WE have seen the differences between powers and duties.[1] It is necessary now to consider specific powers which are given by law to trustees. These powers are nearly all subject to contrary provision in the trust instrument.[2]

1. POWER OF SALE

It is necessary to distinguish between a trust for sale and a power to sell. We have seen that the former is imperative, the latter discretionary.[3] However a trust for sale includes, by statute, a power in the

[1] *Ante*, p. 95.
[2] T.A. 1925, s. 69 (2).
[3] *Ante*, p. 95.

trustees, in their discretion, to postpone sale.[4] Special rules relate to land, chattels and other property.

A. Land

Land is generally held either by a fee simple owner absolutely entitled, or under a settlement or under a trust for sale.[5] In the first case, there is, of course, no trust. Settled land is vested in the tenant for life upon the trusts of the settlement, and he can sell. Land held on trust for sale is vested in the trustees, and they hold upon trust to sell, with a power to postpone sale at their discretion and have all the powers of a tenant for life under the Settled Land Act 1925.[6] Rarely, land may be vested in trustees who hold on trust for a sole beneficiary of full age. In such circumstances, the land appears to be "property in his hands not in a state of investment"[7] which the trustees have power to sell. But the beneficiary can at any time terminate the trust.[8]

B. Chattels

Where chattels or other personalty are held upon trust for sale, the position is the same as with land except that the receipt of a sole trustee is sufficient discharge to a purchaser.[9] The trust for sale may arise expressly, or by statute,[10] or be implied, as we have seen, under the rule in *Howe* v. *Earl of Dartmouth*.[11] When chattels are settled to devolve with settled land the tenant for life has power to sell them with the consent of the court and the purchase money must be paid to the trustees as capital money under the Settled Land Act 1925.[12] Where personal chattels are settled without reference to settled land on trusts creating entailed interests, the trustees may sell the chattels with the consent of the usufructuary if of full age,[13] and the purchase money will be held on the same trusts as the chattels. In other cases, where chattels are settled for successive interests, but neither Settled Land Act 1925, s. 67, nor Law of Property Act, s. 130, applies, the court may in appropriate cases order a sale under Trustee Act 1925, s. 57.[14]

4 L.P.A. 1925, s. 25, *ante*, p. 95.
5 S.L.A. 1925, s. 1.
6 L.P.A. 1925, s. 28 (1).
7 T.I.A. 1961, s. 1.
8 *Saunders* v. *Vautier* (1841) Cr. & Ph. 240; Nathan & Marshall, No. 95; *post*, p. 379; *cf. Re Brockbank* [1948] Ch. 206.
9 T.A. 1925, s. 14; *post*, p. 344.
10 A.E.A. 1925, s. 33.
11 (1802) 7 Ves.Jr. 137; Nathan & Marshall, No. 96; *ante*, p. 329.
12 S.L.A. 1925, s. 67.
13 L.P.A. 1925, s. 130 (5).
14 *Re Hope's W.T.* [1929] 2 Ch. 136.

C. Other Property

In the case of many other forms of property, a power of sale, if not given expressly, will usually be implied. We have seen that a trustee has power to sell property in his hands not in a state of investment; this, and unauthorised investments, and any investments which the trustees think are not suitable for the trust, should be sold and invested in accordance with the express terms of the relevant investment power, or with the provisions of the Trustee Investments Act 1961.[15]

Whenever trustees are authorised to pay or apply capital money for any purpose or in any manner, they have power to raise such money by sale, mortgage, etc., of the trust property then in possession.[16]

D. Sales by Trustees

The detailed provisions relating to sales by trustees are contained in Trustee Act 1925, s. 12. Trustees may

> "sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to re-sell, without being answerable for any loss.
>
> (2) A trust or power to sell or dispose of land includes a trust or power to sell or dispose of part thereof, whether the division is horizontal, vertical, or made in any other way."

As we have seen, trustees are under an over-riding duty to obtain the best price for the beneficiaries.[17] If they fail to do so, the beneficiaries may ask the court for an injunction restraining the sale.[18] But if the sale has taken place, it may not be impeached by a beneficiary on the ground that any of the conditions of the sale were unduly depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.[19] A purchaser will not be affected unless he was acting in collusion with the trustees.[20]

15 *Ante*, p. 317 *et seq.*
16 T.A. 1925, s. 16 (1).
17 *Buttle* v. *Saunders* [1950] 2 All E.R. 193; *ante*, p. 312.
18 *Wheelwright* v. *Walker* (1883) 23 Ch.D. 752.
19 T.A. 1925, s. 13 (1); *Dance* v. *Goldingham* (1873) L.R. 8 Ch.App. 902; *Dunn* v. *Flood* (1885) 28 Ch.D. 586. The trustee may, of course, be liable.
20 T.A. 1925, s. 13 (2).

2. Power to Give Receipts: Section 14

By Trustee Act 1925, s. 14, the written receipt by a trustee for money, securities, etc., is a sufficient discharge to the person paying, and effectually exonerates him from being answerable for any loss or misapplication of the money. The section applies notwithstanding anything to the contrary in the trust instrument,[21] and applies to sole trustees, except in the case of proceeds of sale or capital money arising under a trust for sale or capital money arising under the Settled Land Act where, unless the trustee is a trust corporation, the receipt of at least two trustees is necessary.[22] Where there is more than one trustee, all must sign, in accordance with the rule that they must act together.[23]

3. Power to Insure: Section 19

A. Insurance

There is no duty upon trustees to insure the trust property. The rule is that they are not liable if the property is destroyed; and if the trustees differ on the question whether the property should be insured, it seems that nothing can be done to compel them.[24] However, it is difficult to see how, in some circumstances, failure to insure would be consistent with their general duty of caring for the trust property. A power to insure is contained in section 19, but does not apply where the beneficiaries are absolutely entitled and *sui juris*, and so can end the trust at any time.[25]

> "(1) A trustee may insure against loss or damage by fire any building or other insurable property to any amount, including the amount of any insurance already on foot, not exceeding three fourth parts of the full value of the building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts without obtaining the consent of any person who may be entitled wholly or partly to such income."

The policy moneys must be treated as capital and applied as capital money under the Settled Land Act 1925 or to accord with the terms of the trust for sale or other trust as the case may be.[26]

21 T.A. 1925, s. 14 (3).
22 *Ibid.* s. 14 (2).
23 *Ante*, p. 295; charitable trustees may act by a majority.
24 *Re McEacharn* (1911) 103 L.T. 900.
25 T.A. 1925, s. 19 (2).
26 T.A. 1925, s. 20.

B. Reinstatement

Trustees may apply the money in reinstatement,[27] but such action on their part is subject to the consent of any person whose consent is required by the trust instrument, and, in the case of money deemed to be capital money under the Settled Land Act 1925, to the provisions of that Act as to the application of capital money by the trustees of the settlement.[28] The section is to operate without prejudice to the statutory or other right of any person to require the money to be spent in reinstatement.[29] Persons interested under the settlement can, therefore, insist on having the premises rebuilt if they wish; or, if they do not wish it, can prevent the trustees from using the money for that purpose, but in any case the money is to take the form of capital money.

4. Power to Compound Liabilities: Section 15

Trustees are given a wide discretion as to claims that may be made by third persons and, it seems, persons claiming to be beneficiaries,[30] against the trust estate, or by the trust estate against third persons. Personal representatives and trustees [31] may enter into compromises,[32] accept compositions for debts, allow time for payment of debts, submit doubtful points to arbitration, accept property before the time at which it is made transferable, sever and apportion any blended trust funds or property, and may enter into such agreements and execute such instruments as may be necessary for the efficient performance of these duties.[33] Trustees are not liable for loss caused by any act done by them in the exercise of the powers conferred by this section as long as it is done in good faith, and they have reached their decision by exercising their discretion and not by failing to consider the matter.[34] They may apply to the court to sanction a compromise. The court must consider what is the best from the point of view of everybody concerned, paying especial attention to the interests of infants.[35]

[27] For the general law as to this subject, and as to s. 83 of the Fire Prevention (Metropolis) Act 1774 in particular, see Preston and Colinvaux, *Law of Insurance* (2nd ed.), p. 174 *et seq.*

[28] T.A. 1925, s. 20 (4).

[29] *Ibid.* s. 20 (5).

[30] *Re Warren* (1884) 51 L.T. 561; *Eaton* v. *Buchanan* [1911] A.C. 253; *cf. Abdallah* v. *Rickards* (1888) 4 T.L.R. 622.

[31] Including the Judicial Trustee; *Re Ridsdel* [1947] Ch. 597.

[32] There must be a genuine dispute: *Chapman* v. *Chapman* [1954] A.C. 429; but one claim must necessarily be wrong; *Re Ridsdel, supra.*

[33] See *Re Shenton* [1935] Ch. 651.

[34] *Re Greenwood* (1911) 105 L.T. 509; *ante*, p. 313.

[35] *Re Ezekiel's S.T.* [1942] Ch. 230.

5. Power in Regard to Reversionary Interests: Section 22

Where part of the trust property consists of choses in action or reversionary interests the trustees may, on such interests falling into possession, make arrangements for their valuation, without being responsible for any loss, if they act in good faith.[36] Further, they need not place a *distringas* notice,[37] or apply for a stop order,[38] on securities whereout such an interest is payable, and need not take any proceedings against persons in whom securities for the time being are vested, *unless* required in writing to do so by some person beneficially interested under the trust, and adequate provision is made for the payment of the cost of such proceedings. But nothing in the section is to be construed as relieving trustees from the duty of getting in such interests as soon as possible after their falling into possession, for this is one of their primary duties.[39]

6. Power to Delegate [40]

A. The Early Rule in Equity

The basic rule is that a person entrusted with a fiduciary duty does not fulfil it if he simply lays it on the shoulders of someone else; he remains liable for the other person's default.[41] But this rule was never, even in the times when the most rigorous views were being taken of the standard of conduct required from a trustee, inflexible. Indeed, there are certain things which a man of business would always delegate to a skilled agent. Thus, the employment of solicitors for legal, and brokers and bankers for financial, business is sanctioned by the ordinary business practice. This was recognised as early as 1754, by Lord Hardwicke in *Ex p. Belchier*,[42] and the trend of judicial decision, fortified by occasional statutory provisions, grew more and more tolerant of delegation in cases of commercial necessity. Following the two famous decisions of the House of Lords in *Speight* v. *Gaunt* [43] and *Learoyd* v. *Whiteley*,[44] it could be said that delegation was permissible if the trustees could show that it was reasonably necessary in the circumstances or was in accordance with

36 *Ibid.*, s. 22 (1).
37 A notice forbidding the transfer of stock on a company's books or the payment of dividends, without notice to the person on whose behalf the notice was given. This is now usually called a "stop notice." See R.S.C., Ord. 50, rr. 11–14.
38 See R.S.C., Ord. 50, r. 10.
39 See *ante*, p. 311.
40 (1959) 22 M.L.R. 381 (G. H. Jones).
41 *Turner* v. *Corney* (1841) 5 Beav. 515 at p. 517, *per* Lord Langdale.
42 (1754) Amb. 218; Nathan & Marshall, No. 91.
43 (1884) 9 App.Cas. 1; Nathan & Marshall, No. 92.
44 (1887) 12 App.Cas. 727.

ordinary business practice. The trustees must exercise proper care in the selection of the agent, must employ him in his proper field,[45] and must exercise general supervision.[46] The trustee would not then be liable for the defaults of the agent; but a trustee's discretions could not be delegated[47]; the exculpatory clause expressly limiting his liability to cases of "wilful default" did not relieve him from the responsibility of acting as a prudent man of business.[48] Nor did the statutes of 1859 and 1893, the predecessors of Trustee Act 1925, s. 30 (1), which restricted the liability of trustees to cases of wilful default, do more than change the onus of proof; these statutes placed the onus on "those who seek to charge an executor or trustee with a loss arising from the default of an agent, when the propriety of employing the agent has been established."[49]

B. Trustee Act 1925: Section 23 (1)

But the position under the Trustee Act 1925 rests on a different principle, for trustees are no longer required to show a need to delegate. Delegation as such is accepted as a normal method of performing the duties incidental to trusteeship; but the overall duties of trusteeship remain of course on the trustees. The effect of the new statutory powers upon the overall responsibilities of a trustee is a matter of dispute. The question turns on the proper construction of section 23 (1) which provides:

> "Trustees or personal representatives may, instead of acting personally, employ and pay an agent, whether a solicitor, banker, stockbroker, or other person, to transact any business or do any act required to be transacted or done in the execution of the trust, or the administration of the testator's or intestate's estate, including the receipt and payment of money, and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent if employed in good faith."

This provision was considered by Maugham J. in *Re Vickery*[50]:

> An executor (the defendant) employed, to wind up a small estate, a solicitor named Jennens, who, unknown to him, had

[45] *Fry* v. *Tapson* (1884) 28 Ch.D. 268; Nathan & Marshall, No. 93.
[46] *Matthews* v. *Brise* (1845) 10 Jur.(o.s.) 105; *Rowland* v. *Witherden* (1851) 3 Mac. & G. 568.
[47] *Speight* v. *Gaunt*, *supra*.
[48] *Rehden* v. *Wesley* (1861) 29 Beav. 213.
[49] *Per* Lord Selborne in *Re Brier* (1884) 26 Ch.D. 238 at p. 243; *Re Chapman* [1896] 2 Ch. 763 at p. 776, *per* Lindley L.J.
[50] [1931] 1 Ch. 572.

twice been suspended from practice. The beneficiaries (the plaintiffs) objected to his appointment, and also to the defendant's permitting the money to be under the control of the solicitor. The defendant pressed the solicitor for payment and was promised that this would come shortly. Eventually the plaintiffs instructed a different solicitor, and Jennens absconded and the money was lost. Maugham J. held that the defendant was not liable. His decision was based upon two separate sections of the Act: sections 23 (1) and 30 (1), which raise quite separate issues, but which do not appear to have been kept separate in the case or in some of the comment upon it.

Section 23 (1) was new in 1925. It widens the powers of trustees to delegate. Indeed, Maugham J. said [51] "it revolutionises the position of a trustee or an executor so far as regards the employment of agents. He is no longer required to do any actual work himself, but he may employ a solicitor or other agent to do it, whether there is any real necessity for the employment or not. No doubt he should use his discretion in selecting an agent, and should employ him only to do acts within the scope of the usual business of the agent."

It is sometimes suggested that the only requirement of a trustee now is one of subjective good faith in the original appointment of the agent.[52] So long as he appoints an agent whom he thinks to be the right appointment, he is absolved from any further responsibility; so that, as in *Re Vickery*,[53] a trustee who negligently leaves money in the hands of an agent, employed in good faith, is free of liability, however long the money is left, and however inadequate the supervision of the agent. It is submitted that there is no need to reach this conclusion, either on the judgment of Maugham J. or on the words of the section.

Although regarding the issue of "good faith" as a subjective matter, Maugham J. saw no reason to suppose that the pre-1926 rules relating to the requirement of discretion in selecting the agent and the limitation of the agent to the usual scope of his business should not still apply. Section 23 (1) clearly allows delegation in circumstances in which it would not have been permitted before. It is submitted that the section can be construed so as to apply the pre-1926 rules to the wider area of post-1925 delegation, and thereby to reach a result which is more consistent with the needs of the protection of the beneficiaries.[54] The Act is a consolidating Act, and

[51] *Ibid.* at p. 581.
[52] (1931) 47 L.Q.R. 330 (H.P.) and 463 (W.S.H.).
[53] [1931] 1 Ch. 572; Nathan & Marshall, No. 94.
[54] (1959) 22 M.L.R. 381; see *Green* v. *Whitehead* [1930] 1 Ch. 38.

should be construed so as to effect as little change in the law as possible.[55] Two further lines of argument support this less extreme construction of section 23 (1).

i. Section 23 (1) Assumes the Continuation of the Pre-1926 Rules. It should therefore be construed so as to be consistent with them. A number of difficulties arise if section 23 (1) is construed so as to excuse trustees from all responsibility other than bona fide appointment.[56]

(a) *The Proviso to Section* 23 (3). The proviso becomes meaningless. Section 23 (3) permits delegation by a trustee "without prejudice to such general power of appointing agents" as is contained in section 23 (1) in specified matters, including the receipt of money by agents in certain circumstances; but a proviso to subsection (3) retains the trustee's previous liability if "he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary [57] to enable the banker or solicitor, as the case may be, to pay or transfer the same to the trustee." If the trustee is given a wider protection by the general exemption under subsection (1), this restriction on his exemption in these specific cases is meaningless.

(b) *The Indemnity Clause in Section* 30 (1).[58] This clause would be unnecessary if "a trustee need never act personally and will never be liable for loss save through his wilful default." [59]

(c) *The Relationship between Sections* 23 (1), 23 (2), *and* 25. Section 23 (2) empowers a trustee to appoint an agent for the purpose of administering any part of the trust estate situated outside the United Kingdom, "or executing or exercising any discretion or trust or power vested in them in relation to any such property," and authorises also the appointment of sub-agents. Section 25 gives to a trustee a power of delegating his trust during absence abroad. Any trustee, who intends to remain abroad for more than one month, may delegate his trust to any other person (except a sole co-trustee), or to a trust corporation, by power of attorney. The power of attorney is revoked by the donor's return to the United Kingdom.

As will be seen, each of these provisions allows a wider delegation than is allowed by section 23 (1); for they allow the delegation

[55] *Re Turner's W.T.* [1937] Ch. 15.
[56] (1959) 22 M.L.R. 381 (G. H. Jones); (1931) 47 L.Q.R. 330 (H. P.).
[57] *Re Sheppard* [1911] 1 Ch. 50 (no liability unless the trustee knew or ought to have known of the receipt).
[58] *Post*, p. 351.
[59] (1931) 47 L.Q.R. 330 at p. 331 (H. P.).

of " discretions " and " trusts." If Maugham J. is right, they should only be used when such additional delegation is essential, for the protection given by these subsections is less than that stated in *Re Vickery* [60] to be provided by section 23 (1). Under section 23 (2), protection is given to the trustees in respect of losses arising " by reason only of their having made any such appointment "; pre-1926 liability remains. And section 25 provides that the donor of the power of attorney remains liable for the acts and defaults of the donee.[61] In respect of general delegation of ministerial matters, the protection they give is therefore less than that under section 23 (1) as construed in *Re Vickery*.[60]

(d) *The Power of Delegation in the Law of Property Act* 1925, *s.* 29. The wide interpretation of section 23 (1) is inconsistent with the limited power of delegation conferred upon trustees for sale by Law of Property Act 1925, s. 29.[62] The 1925 legislation should be construed consistently, where possible.

It is submitted that Maugham J. should have construed section 23 (1) in the light of these other provisions which assume the continued operation of the pre-1926 principles of liability. Subsection (1) would then give the wider power of delegation; and the phrase " shall not be responsible for the default of any such agent if employed in good faith " would extend the exemption given by the pre-1926 law to such agents as the trustees were then authorised to employ. In other words " to construe the words ' in good faith . . . ' so that they limit only the *act* of employment." [63] It is submitted that such a construction does less violence to the words of the Trustee Act as a whole than does Maugham's J.'s solution.

ii. Primary and Vicarious Liability. It can further be argued that the exemption is in respect of the trustee's vicarious liability, and does not affect his primary duties and liabilities.

The rule has always been that a trustee is vicariously liable for the defaults of an agent to whom the affairs of the trust were improperly delegated; but not where a loss occurred by reason of the act of an agent to whom a proper delegation was made.[64] Section 23 (1) is a section which widens the power to delegate, and it is possible to construe the exemption given in the concluding phrase as being applicable to the vicarious liability of trustees; and to leave

60 [1931] 1 Ch. 572; Nathan & Marshall, No. 94.
61 T.A. 1925, s. 25 (2).
62 Allowing, within limits, trustees for sale to delegate their powers of management to the tenant for life.
63 (1959) 22 M.L.R. 381 at p. 389 (G. H. Jones).
64 *Speight* v. *Gaunt* (1884) 9 App.Cas. 1; Nathan & Marshall, No. 92.

intact their primary duty of managing the affairs of the trust, taking decisions and of supervising the work of agents to whom proper delegation had been made.[65]

Such a conclusion is not inconsistent with *Re Vickery*,[60] for in that case there was no disapproval of the original delegation; the executor would be protected under the suggested narrower construction of the subsection. Nor is it clear that the executor was in breach of his general duty of supervision; it is difficult to see what else he could have done. Once a matter is in the hands of a solicitor, it is difficult to know what the executor could do beyond pressing the solicitor to account. This he did; and, in the circumstances with less than £300 at stake, it was unlikely that such a sum would be a temptation to a solicitor even of dubious reputation. It is quite possible, as Maugham J. thought,[66] that the defendant would have been held not liable under the pre-1926 law.

C. Trustee Act 1925, s. 30 (1)

> "A trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss unless the same happens through his own wilful default."

i. Scope of Section 30 (1): "Wilful Default." It should first be noted that the protection given by this subsection is limited to the situations mentioned therein. The words "for any other loss" are construed *ejusdem generis*.[67]

The extent of the protection given by the subsection depends largely upon the construction of the phrase "wilful default." We have seen that this phrase, when inserted into express exculpatory clauses, did not excuse a trustee from the necessity of acting as a prudent man of business, and that the incorporation of the clause in the predecessors of Trustee Act 1925 had the effect only of changing the burden of proof.[68] It is submitted that Maugham J. should have so construed section 30 (1). However, he introduced a subjective construction to the phrase "wilful default" which had

[65] (1959) 22 M.L.R. 381 at pp. 394–395 (G. H. Jones).
[66] [1931] 1 Ch. 572 at pp. 584–585.
[67] *Ibid.* at p. 582, *per* Maugham J.
[68] *Re Brier* (1884) 26 Ch.D. 238; *ante*, p. 347.

been applied to the construction of these words in *Re City Equitable Fire Insurance Co.*,[69] where Romer J. said that a person is not guilty of wilful default "unless he knows that he is committing and intends to commit a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty."[70] Romer J. was there construing a set of articles of association dealing with directors' liability, and his definition has no bearing upon the construction of the Trustee Act. Maugham J.'s definition is as little justified by authority as by principle; it is to be hoped that the courts will return to the earlier test of the prudent man of business.

In *Re Lucking's Will Trusts*,[71] Cross J. showed no ready acceptance of all Maugham J.'s views. The facts of this case show the changes that have occurred in the manner in which, over the years, trust assets have come to be administered.

> The trust assets included a majority holding of shares in a private company running a business. The trustees could not themselves run the business, so a manager was appointed who eventually went bankrupt having appropriated considerable sums of company money to himself. Cross J. considered that "wilful default" in section 30 (1) did not govern the trustees' liability, as the manager was not to be regarded as a person appointed to receive deposits of property; and that, considering section 23 (1) alone as relevant, the liability was to be determined by looking to the way in which "an ordinary prudent man would conduct a business of his own."[72] Applying this standard, Cross J. held a trustee (who was also a director) liable for not adequately supervising the manner in which sums were withdrawn from the company's accounts.

It follows that, in this type of case, a trustee retains a duty to supervise, despite the appointment of a competent agent, and that, "good faith" as in section 23 (1) does not prevent a trustee from having to undertake a continuing responsibility for supervising in a reasonable manner the affairs of his trust. Cross J. also cast some doubt on Maugham J.'s definition of "wilful default" in section 30 (1). The trustees' standards which were established by the pre-1926 cases in respect of authorised delegation and in respect of exculpatory clauses may yet return.

69 [1925] 1 Ch. 407, followed by Astbury J. in *Re Munton* [1927] 1 Ch. 262.
70 *Ibid.* at p. 434; quoted in the Court of Appeal by Warrington L.J. [1925] Ch. 523 at pp. 523–524.
71 [1968] 1 W.L.R. 866.
72 *Ibid.* at p. 874.

ii. Capital and Income. At this point, since section 30 (1) includes a reference to co-trustees, we can note an important distinction between receipt of capital and receipt of income. The basic rule is that capital should be received by all the trustees unless some of them have power under statute or under their trust deed to give good receipts and discharges. It is most important for purchasers of trust property to remember this rule.[73] Similarly, investments of trust moneys should be made in the joint names of the trustees. If two trustees divide investments, and invest separately, and one trustee commits a breach of trust, the other will be liable to make good the loss.[74]

The receipt of income is, however, treated differently from the receipt of capital.

> In *Townley* v. *Sherborne*[75] it was decided that the duty of receiving rents may be delegated to one of several trustees, on the ground that a requirement of receipt by all the trustees would involve inconveniences that would outweigh all the advantages of such a course.

Even where a trustee may safely permit his co-trustee to receive trust moneys, he will, nevertheless, be liable if he permits him to retain them for a longer period than the circumstances of the case necessitate.[76]

D. Other Delegating Sections

Other sections in the Trustee Act 1925 giving to the trustees a power of delegation are discussed in other chapters where they are most particularly relevant.[77] If they are all considered together as a group it will be seen that, if the wide interpretation discussed above of section 23 (1) is correct, many of them overlap and not all of them required specific enactment. There is, in this area of the law, one of the least apt marryings of old and new in the whole of the 1925 legislation.

7. Powers of Maintenance and Advancement

Where any person has a contingent interest in property the question arises as to the use which should be made of the income until the gift

[73] See *Lee* v. *Sankey* (1873) L.R. 15 Eq. 204 and Trustee Act 1925, s. 14; see also *ante*, pp. 343, 344.
[74] *Lewis* v. *Nobbs* (1878) 8 Ch.D. 591.
[75] (1634) J.Bridg. 35; Nathan & Marshall, No. 113. Such a power may be countermanded in a particular trust deed: *Brice* v. *Stokes* (1805) 11 Ves.Jr. 319.
[76] *Carruthers* v. *Carruthers* [1896] A.C. 659.
[77] See pp. 313, 318, 323–324, 338.

vests. Otherwise the income would not be put to any use during that period. The policy is to allow the gift to "carry the intermediate income" unless there are good reasons to the contrary. Generally speaking, all testamentary gifts except contingent pecuniary legacies carry the intermediate income unless it is otherwise disposed of.[78]

One of the most common contingencies is that of attaining the age of 21. It is important to make provision for the use of the income for the maintenance and education of the young. There is no comfort in the prospect of a fortune at twenty-one if you starve for lack of money in your teens.

A similar question arises in the opposite case of an infant who has a vested interest in property; for it may then be desirable that he should not be entitled to draw the whole of the income. It is better that he should receive what is reasonably necessary for his maintenance and education, and that the balance should be put aside and invested for him. Again, it may be that capital sums may be needed to establish him in a profession or in business or on his marriage.

These matters may be expressly provided for in the trust instrument. If not, the court has an inherent power to approve the use of income, or even of capital for the maintenance of infants.[79] But the statutory powers of maintenance[80] and advancement[81] about to be discussed are sufficient to meet the needs of most situations. Such powers are often used at the present time, not only, or mainly, for their original purposes, but rather for the tax and estate duty advantages which they can offer.[82]

A. Maintenance[83]

Trustee Act 1925, s. 31 (1), provides as follows:

> "Where any property is held by trustees in trust for any person for any interest whatsoever, whether vested or contingent, then, subject to any prior interests or charges affecting that property—
>
> (i) during the infancy of any such person, if his interest so long continues, the trustees may, at their sole discretion, pay to his parent or guardian, if any, or otherwise apply for or towards his maintenance, education, or benefit,[84] the whole

[78] *Post*, pp. 357, 473.

[79] *Wellesley* v. *Wellesley* (1828) 2 Bli.(N.S.) 124; *Barlow* v. *Grant* (1684) 1 Vern. 255; Lewin, pp. 301–302; *post*, p. 364.

[80] T.A. 1925, s. 31.

[81] T.A. 1925, s. 32.

[82] *Pilkington* v. *I.R.C.* [1964] A.C. 612.

[83] See (1953) 17 Conv.(N.S.) 273 (B. S. Ker) for a most helpful discussion of s. 31.

[84] See *Re Heyworth's Contingent Reversionary Interest* [1956] Ch. 364; *Pilkington* v. *I.R.C.*, *supra*; *Re Pauling's S.T.* [1964] Ch. 303; (1959) 23 Conv.(N.S.) 27 (D. W. M. Waters).

or such part, if any, of the income of that property as may, in all the circumstances, be reasonable, whether or not there is—

(*a*) any other fund applicable to the same purpose; or

(*b*) any person bound by law to provide for his maintenance or education; and

(ii) if such person on attaining the age of [eighteen][84a] years has not a vested interest in such income, the trustees shall thenceforth pay the income of that property and of any accretion thereto under subsection (2) of this section to him, until he either attains a vested interest therein or dies, or until failure of his interest: . . ."

i. Prior Interests. The power of maintenance can only arise where a person is entitled to the income, whether by virtue of a vested interest, or by virtue of a contingent interest which carries the intermediate income.[85] If the income is applicable in favour of a prior interest, no question of its use for maintenance can arise. Similarly, a member of a discretionary class is not entitled to any income and the section does not therefore apply to payments made by the trustees in the exercise of their discretion.[86]

ii. Infancy. The question of application of income for the infant's maintenance, education or benefit, whether his interest is vested or contingent, is a matter for the trustees' discretion. The decision to apply income for such infant's maintenance must be taken as a result of a conscious exercise of their discretion, and not automatically.[87] The trustees should, so far as practicable, arrange for maintenance payments to be shared proportionately among various funds available for the purpose.[88] The payments are usually made to the parent or guardian whose receipt is a sufficient discharge for the trustees.

iii. Contrary Intention. In the case of an adult contingently entitled, paragraph (ii) of subsection (1) provides, in apparently imperative terms, that the income shall be paid to that person.[89] His entitlement to the capital must, of course, await the happening of the contingency. This provision, however, gives way to a contrary intention.

[84a] Reduced from 21 by Family Law Reform Act 1969.
[85] T.A. 1925, s. 31 (3); *post*, pp. 357, 473.
[86] *Re Vestey's Settlement* [1951] Ch. 209.
[87] *Wilson* v. *Turner* (1883) 22 Ch.D. 521.
[88] T.A. 1925, s. 31 (1), proviso.
[89] *Re Jones' W.T.* [1947] Ch. 48.

In *Re Turner's Will Trusts*,[90] a testator provided interests in favour of his grandchildren contingently on their attaining the age of 28, and expressly gave the trustees power to apply the income for their maintenance, education and benefit until that time, and instructed the trustees to accumulate the surplus.

Of the three grandchildren, two attained the age of 28 during the testator's lifetime. The third, Geoffrey, was 21 when the testator died; and himself died three years later aged 24. Some £3,000 had been accumulated since the testator's death. The question was whether section 31 (1) applied, in which case this income should have been paid to Geoffrey and would now be part of his estate and thus add to the estate duty liability; or whether the express provision in the will directing the accumulation until the age of 28 took effect. The Court of Appeal held that, in spite of the imperative terms of section 31, it gave way to a direction of a contrary intention in accordance with Trustee Act 1925, s. 69 (2).

iv. Surplus Income to be Accumulated for Infants. Subsection (2) provides that the residue of the income, not applied for maintenance, shall be accumulated by investment during the infancy of the person contingently entitled. Income from such investments becomes available for future maintenance; and the accumulations themselves may be applied, during the infancy, as if they were income arising in the then current year.

v. Disposal of Surplus. On the majority (or earlier marriage) of an infant, the question arises whether or not the surplus should be given to him. As would be expected, he is entitled to the accumulations, if he had a vested life interest during his infancy (for he was entitled all along to the income), or becomes entitled on his majority (or earlier marriage) to the capital.[91] In all other cases, as for example the case of a life tenant whose interest was contingent until his majority, the accumulations are added to the capital for all purposes.[92]

vi. Vested Annuities. The section applies to a vested annuity as if the annuity were the income of property held by the trustees in trust to pay the income thereof to the annuitant. Where accumulations have been made during a minority, they are in any case payable to

90 [1937] Ch. 15; *Re McGeorge* [1963] Ch. 544; Nathan & Marshall, No. 107; where the contrary intention was shown by deferring the gift to a daughter until after the death of a widow.

91 T.A. 1925, s. 31 (2) (i).

92 *Ibid.* s. 31 (2) (ii); *Re Joel's W.T.* [1967] Ch. 14.

the annuitant on his majority or to his personal representatives on his earlier death.[93]

vii. Gifts Carrying Intermediate Income. As we have seen, section 31 only applies in the case of contingent interests if they carry the intermediate income.[94] Vested gifts automatically do so, unless a contrary intention appears, as for example a gift of the income to someone else for a period, or a direction to accumulate until majority. The question whether a contingent gift carries the intermediate income is more conveniently dealt with in a discussion of the subject of the administration of the estates of deceased persons, and will be found in Chapter 23.[95]

viii. Aggregation of Income of Children with that of their Parents. Prior to April 1969, a contingent gift to children with a power to use the income for maintenance and to accumulate that not so used—such as arises under Trustee Act 1925, s. 31—offered considerable tax advantages. So long as the settlor was someone other than the parent, income paid to the child's parent or guardian for his maintenance, education or benefit counted as the child's income and was taxable as such; his rate of tax would normally be less than that of his parents. By Finance Act 1968, s. 15,[96] which came into effect in April 1969, the unearned income of an infant from whatever source, if he is unmarried and not regularly working, is aggregated with that of his parents. The aggregation is avoided if the trustees do not pay out any income but accumulate it; for the income is not that of the children. Until 1969 repayment of tax in respect of an infant's personal allowances could be claimed when the accumulations of income were paid to him on attaining twenty-one (or other vesting age).[97] The Finance Act 1969, section 11 (5), however, provides that claims may not be made in respect of tax paid subsequently to April 1969. Income of the infant, now aggregated with that of the parent, is not taken into account in determining the parent's entitlement to child relief.[98]

ix. Gifts to Classes. Where there is a gift to a class contingently on attaining the age of 21, the trustees may treat separately, for these purposes, each person's presumptive share. That is to say, that when one member of the class attains 21 and becomes entitled to his share, the trustees may continue to exercise their powers of maintenance in respect of the other members.[99] Similarly, income

[93] *Ibid.* s. 31 (4).
[94] *Ibid.* s. 31 (3); *ante*, p. 355.
[95] *Post*, p. 473.
[96] See also F.A. 1968, Sched. 8, and F.A. 1969, s. 17.
[97] I.T.A. 1952, s. 228.
[98] F.A. 1968, s. 15 (5).
[99] *Re Holford* [1894] 3 Ch. 30; *Re King* [1928] Ch. 330.

may only be used for the maintenance of any member of the class if that income was earned during the lifetime of that member,[1] but if a member of a class dies without obtaining a vested interest, the accumulation of income representing his contingent share is added to the capital under section 31 (2) (ii), although this means that future born members will thus benefit from it.[2]

B. Advancement

i. The Meaning of Advancement. We saw that maintenance was concerned with the payment of income for the benefit of infants. Advancement is concerned with the payment or application of capital sums to the beneficiary's advantage before the time comes when he is entitled to demand the fund. The scope of the power depends upon the terms of the instrument giving it, and, since 1925, upon Trustee Act 1925, s. 32.[3] The purposes for which payments under such power have been desired and made, have greatly changed with the passage of years. It will be no surprise to be told that advancements are made at the present day, not only for the purpose of providing capital sums when needed, but also for the purpose of estate duty saving.

Thus, suppose a fund is held on trust for A, the capital being payable to him on attaining 25. If A marries, or sets up in business or in a profession before that time, a power of advancement makes possible the payment to him of some or all of the capital of the fund to help with such a project. There is a similar but more complicated question if A's interest is subject to a prior life interest in X; for X's income will be affected by any payments out of the capital fund which produces it. Or if A's interest is contingent on his attaining 25; for if payments are made to A and A never attains 25 (*i.e.*, " never vests ") the capital payments will have been made to the wrong person.

The estate duty question arises in this form: trustees hold a large sum on trust for A for life and then to A's children equally at 21. Independently of the fund A is rich enough to provide the children with all they need. Can the trustees under a power of advancement make capital payments to the children in order to reduce the settled fund and therefore the amount of estate duty payable on A's death? [4] Such a payment is certainly not an " advancement " with-

[1] *Re Joel's W.T.* [1967] Ch. 14.
[2] *Ibid.*; not following *Re King*, *supra*, on this point.
[3] *Post*, p. 360.
[4] *Pilkington* v. *I.R.C.* [1964] A.C. 612; Nathan & Marshall, No. 108; the fund will be aggregable with A's free property for the purpose of ascertaining the rate of duty payable at A's death; *ante*, p. 184.

in the usual meaning of the word. But no one could deny that the payment of duty-free sums to the children, now, is much more beneficial to them than the payment of what is left after duty on A's death. A further question arises whether such sums must be held in trust for the children absolutely, or whether they may themselves be settled by the creation of sub-trusts for the benefit of themselves and also for other persons such as future dependants.

ii. Original Meaning of Advancement. "The word 'advancement' itself meant in this context the establishment in life of the beneficiary who was the object of the power or at any rate some step that would contribute to the furtherance of his establishment.[5] . . . Typical instances of expenditure for such purposes under the social conditions of the nineteenth century were an apprenticeship or the purchase of a commission in the Army or of an interest in business. In the case of a girl there could be advancement on marriage.[6]"[7]

iii. Express Powers. Until 1925 there was no statutory power of advancement. Express powers of advancement were given narrow scope consistent with the established meaning of the word.[8] So, "to prevent uncertainties about the permitted range of objects for which moneys could be raised and made available, such words as 'or otherwise for his or her benefit' were often added to the word 'advancement.' It was always recognised that these added words were 'large words'[9] and indeed in another case[10] the same judge spoke of preferment and advancement as being 'both large words' but of 'benefit' as being the 'largest of all.'"[11] The combined phrase "advancement or benefit" is read disjunctively[12]; it now means "any use of the money which will improve the material situation of the beneficiary."[13] The scope of an express power depends

[5] See *per* Jessel M.R. in *Taylor* v. *Taylor* (1875) L.R. 20 Eq. 155; *Lowther* v. *Bentinck* (1874) L.R. 19 Eq. 166 (payment of debts); *Roper-Curzon* v. *Roper-Curzon* (1871) L.R. 11 Eq. 452 (starting a career at the Bar); *Re Breed's Will* (1875) 1 Ch.D. 226; *Re Long's Settlement* (1868) 38 L.J.Ch. 125 (passage money to go to a colony); *Re Williams' W.T.* [1953] Ch. 138 (purchase of a house as a surgery).

[6] *Lloyd* v. *Cocker* (1860) 27 Beav. 645.

[7] *Per* Lord Radcliffe in *Pilkington* v. *I.R.C.* [1964] A.C. 612 at p. 634; Nathan & Marshall, No. 108.

[8] *Per* Kennedy L.J. in *Molyneux* v. *Fletcher* [1898] 1 Q.B. 648 at p. 653.

[9] See Jessel M.R. in *Re Breed's Will* (1875) 1 Ch.D. 226 at p. 228.

[10] *Lowther* v. *Bentinck* (1874) L.R. 19 Eq. 166 at p. 169.

[11] *Per* Lord Radcliffe in *Pilkington* v. *I.R.C.* [1964] A.C. 612 at p. 634; *Re Brittlebank* (1881) 30 W.R. 99 at p. 100; *Re Halsted's W.T.* [1937] 2 All E.R. 570 at p. 571; *Re Moxon's W.T.* [1958] 1 W.L.R. 165 at p. 168; *cf.* the meaning of the word "benefit" in T.A. 1925, s. 31, and in Variation of Trusts Act of 1958, s. 1; *post*, p. 393; (1959) 23 Conv.(N.S.) 27 (D. W. M. Waters).

[12] *Lowther* v. *Bentinck* (1874) L.R. 19 Eq. 166; *Re Halsted's W.T.*, *supra*, at p. 571.

[13] *Per* Lord Radcliffe in *Pilkington* v. *I.R.C.* [1964] A.C. 612 at p. 635.

of course upon its own language. The standard form of express power has now been incorporated in the Trustee Act 1925, s. 32; and express provisions on the question of advancement are now usually confined to extensions of the statutory power by making the power applicable to the whole of the beneficiary's presumptive share,[14] or by giving express powers to the trustees to create sub-trusts.[15]

iv. The Statutory Power. Trustee Act 1925, s. 32.

Section 32—" (1) Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the interest of such person is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which he belongs:

Provided that—

(*a*) the money so paid or applied for the advancement or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property; and

(*b*) if that person is or becomes absolutely and indefeasibly entitled to a share in the trust property the money so paid or applied shall be brought into account as part of such share; and

(*c*) no such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless such person is in existence and of full age and consents in writing to such payment or application."

The section does not apply to land or to capital money arising under the Settled Land Act 1925. Its application is always subject to

[14] By proviso (*a*) to T.A. 1925, s. 32, the statutory power extends only to one-half of the beneficiary's presumptive share; *infra*.

[15] *Post*, p. 363; (1959) 23 Conv.(N.S.) 27 (D. W. M. Waters).

the expression of a contrary intention and it has been held to be excluded by a provision for accumulation.[16]

v. Problems in the Application of section 32. Pilkington v. I.R.C.[17] The wide construction of the phrase "advancement" or "benefit" "must have been carried into the statutory power created by section 32, since it adopts without qualification the accustomed wording 'for the advancement or benefit in such manner as they may in their absolute discretion think fit.'"[18] But this leaves open a number of questions; can payments be made for the "benefit" of a person who is not in any way in need? To what extent can an advancement re-settle the money advanced, the re-settlement changing the original trusts? Can trustees, exercising the statutory powers of advancement, delegate their discretion by giving a dispositive discretion to the trustees of the re-settlement; *i.e.*, can they make an advancement on protective or discretionary trusts? These questions were discussed and largely settled in the long litigation over the will of William Norman Pilkington.

> The testator left a share of his residuary estate on trust for his nephew Richard upon protective trusts during his life and after Richard's death upon trust for such of his children or remote issue as he should by deed or will appoint and in default of appointment in trust for such of Richard's children as attained 21 (or, if female, married under that age) in equal shares. Richard had three children of whom a two-year-old daughter Penelope was one. Richard's father (brother of the testator and grandfather of Penelope) had made a settlement in favour of his grandchildren which, so far as it affected Penelope, provided that the trustees were to hold the property on trust to pay the income to Penelope at 21, and the capital for her absolutely at 30 and if Penelope died under 30 leaving children, on trust for such children at 21 with further family trusts in default. The trustees had power to apply the income for Penelope's maintenance until she reached the age of 21, and were to accumulate the surplus income.
>
> The trustees proposed to advance, with the consent of Richard, one-half of Penelope's expectant share under the testator's will, and pay it to the trustees of Richard's father's settlement.

[16] *I.R.C.* v. *Bernstein* [1961] Ch. 399. This is so even if the direction for accumulation contravenes L.P.A. 1925, ss. 164–166; *Re Ransome* [1957] Ch. 348.
[17] [1964] A.C. 612; Nathan & Marshall, No. 108.
[18] *Per* Lord Radcliffe in *Pilkington* v. *I.R.C.*, *supra*, at p. 635; *Re Pauling's S.T.* [1964] Ch. 303.

The House of Lords, reversing the Court of Appeal, which had reversed Danckwerts J., held that this proposal was within the trustees' power under section 32. They held also that the exercise of the power of advancement was analogous to the exercise of a special power of appointment and that in the circumstances the advancement was void for perpetuity.

(a) *Benefit.* On the question of the benefit to Penelope, Lord Radcliffe held that it was immaterial that other persons, such as her future dependants, would benefit also. ". . . if the disposition itself, by which I mean the whole provision made, is for her benefit, it is no objection to the exercise of the power that other persons benefit incidentally as a result of the exercise." [19] The relief from anxiety about the future maintenance of a wife and family has been held to be a sufficient benefit [20]; as has the performance of the obligation felt by a rich man to contribute to a charitable trust where it would be a great burden to do so out of taxed income [21]; and also the payment from a wife's fund to her husband to enable him to set up in business in England and prevent a separation of the family.[22] Similarly, there was no need, as the Court of Appeal had held, to show that the benefit was " related to his or her own real or personal needs." [23] The estate duty saving was a sufficient benefit.[24]

(b) *Settlement of Funds Advanced. Sub-Trusts.* Nor was it any objection that the funds were being subjected to a settlement, and not paid for the sole benefit of Penelope; nor that her enjoyment was deferred. The settlement of advanced funds had many times been approved [25]; and this inevitably meant that the trusts on which the funds would be held under the advancement were different from those laid down by the original settlor.

(c) *Delegation.* Closely connected with the question of resettlement is that of the extent to which trustees, in making an advancement on new trusts, can give discretionary powers to the trustees of the new settlement. In general, *delegatus non potest delegare.*[26]

19 *Per* Lord Radcliffe in *Pilkington* v. *I.R.C.* [1964] A.C. 612 at p. 636; Nathan & Marshall, No. 108; *Re Halsted's W.T.* [1937] 2 All E.R. 570.
20 *Re Halsted's W.T., supra.*
21 *Re Clore's Settlement Trust* [1966] 1 W.L.R. 955.
22 *Re Kershaw's Trusts* (1868) L.R. 6 Eq. 322.
23 *Per* Lord Evershed in *Re Pilkington's W.T.* [1961] Ch. 466 at p. 481.
24 " . . . if the advantage of preserving the funds of a beneficiary from the incidence of death duty is not an advantage personal to that beneficiary, I do not see what is "; *per* Lord Radcliffe in *Pilkington* v. *I.R.C., supra,* at p. 640; see also Upjohn J. in *Re Wills' W.T.* [1959] Ch. 1, 11–12; *Re Clore's Settlement* [1966] 1 W.L.R. 955.
25 *Re Halsted's W.T.* [1937] 2 All E.R. 570; *Re Moxon's W.T.* [1958] 1 W.L.R. 165; *Re Ropner's S.T.* [1956] 1 W.L.R. 902; *Re Wills' W.T.* [1959] Ch. 1; *Re Abrahams' W.T.* [1969] 1 Ch. 463.
26 *Re May* [1926] 1 Ch. 136; *Re Mewburn* [1934] Ch. 112; *Re Wills' W.T., supra.*

However, " the law is not that trustees cannot delegate; it is that trustees cannot delegate unless they have authority to do so. If the power of advancement which they possess is so read as to allow them to raise money for the purpose of having it settled, then they do have the necessary authority to let the money pass out of the old settlement into the new trusts. No question of delegation of their powers or trusts arises. If, on the other hand, their power of advancement is read so as to exclude settled advances, *cadit quaestio*." [27]

This does not, however, solve all the problems. The statutory power allows trustees to advance money by paying it to other trustees to hold on new trusts. Such trusts may include a power of advancement [28]; and presumably section 32 applies to the new trustees. Further, acting on the analogy of cases on special powers of appointment, it seems that the new trusts may include a protective and forfeitable life interest [29]; but that the discretionary trusts which come into effect upon the determination of the life interest are invalid, because the duties of trustees of a discretionary trust involve dispositive (as opposed to administrative) discretions,[30] and these cannot be delegated without express authority.[31]

If that is correct, section 32 appears to give trustees no power to make an advancement upon a new settlement which takes the form of discretionary trusts. Such a situation appears necessarily to raise questions of delegation; and not to be covered by Lord Radcliffe's dictum quoted above.[32] Whether a settlement on discretionary trusts would satisfy the test of " benefit " is another matter. Under such a trust no interest of course is technically given to the advanced beneficiary [33]; but this form of trust is one which, from the broad point of view of the beneficiary and his family, and taking estate duty factors into consideration, would be likely to be the most beneficial. It is submitted that such a trust should be held to be for his benefit. The delegation problem can be met by expressly empowering the trustees of the original settlement to delegate their powers in that manner.[34]

vi. The Provisos. (*a*) Only half the presumptive share of each beneficiary may be advanced under the statutory power. No doubt

[27] *Per* Lord Radcliffe in *Pilkington* v. *I.R.C.* [1964] A.C. 612, 639.
[28] *Re Mewburn* [1934] Ch. 112; *Re Morris* [1951] 2 All E.R. 528; *Re Hunter's W.T.* [1963] Ch. 372.
[29] *Re Boulton's S.T.* [1928] Ch. 703; *Re Hunter, supra*; *Re Morris, supra.*
[30] See (1953) 17 Conv.(N.S.) 285, 289 (A. K. R. Kiralfy).
[31] *Per* Eve J. in *Re Boulton's S.T.* [1928] Ch. 707–709.
[32] *Supra.*
[33] *Gartside* v. *I.R.C.* [1968] A.C. 553; *ante*, p. 187.
[34] In (1963) 27 Conv.(N.S.) 65 the view is taken that *Pilkington* v. *I.R.C.* ([1964] A.C. 612) does authorise the creation of discretionary trusts under the statutory power of advancement.

this is a wise limitation as a general rule; for if the contingent interest of the advanced beneficiary never vests, the fund in the hands of the person next entitled is reduced by the amount advanced. However, where it is advantageous to be able to advance one-half, it may be more advantageous to be able to advance the whole; and it is common to extend the statutory power so as to give the trustees power to advance the whole if they see fit.

(*b*) This is an application of the doctrine of "hotchpot," which attempts to effect an equality between the members of a class of beneficiaries. The doctrine is discussed below.[35]

(*c*) By advancing some or all of the capital, the fund which provides the income of the tenant for life is reduced. The consent of the tenant for life is therefore requisite to the exercise of the power. The court has no power to dispense with this consent.[36] A member of a discretionary class is not, however, a person whose consent is required.[37]

C. The Court's Inherent Power to Provide Maintenance and Advancement

The court has inherent power to order provision to be made for an infant out of his property. This power is usually applied in respect of income[38]; but occasionally capital is used.[39] Also, as will be seen,[40] the court has statutory power to make an order authorising a person to make use of an infant's property with a view to the application of the capital or income for the infant's maintenance, education or benefit.

D. Responsibility of the Trustees to See to the Application of the Money Advanced

We have seen that the trustees must be satisfied that the proposed advancement is for the benefit of the beneficiary. The next question is whether the trustees, in making an advancement, are under an obligation to see that the money is applied towards the purposes for which the payment was made. In *Re Pauling's Settlement Trusts*[41] the Court of Appeal, dealing with an express power to advance one-half of an expected or presumptive share for the "absolute use" of a beneficiary, held that the power was fiduciary; the trustees could hand over a sum of capital quite generally to a beneficiary if they

35 *Post*, p. 464.
36 *Re Forster's Settlement* [1942] Ch. 199.
37 *Re Harris' Settlement* (1940) 162 L.T. 358; *Re Beckett's Settlement* [1940] Ch. 279.
38 *Wellesley* v. *Wellesley* (1828) 2 Bli.(N.S.) 124.
39 *Barlow* v. *Grant* (1684) 1 Vern. 255.
40 *Post*, p. 385; T.A. 1925, s. 53.
41 [1964] Ch. 303; *post*, p. 403.

thought that he was the type of person who could be trusted with the money. Or, if the trustees made the advance for a particular purpose, which they stated, they can quite properly pay it over if they reasonably think that he can be trusted to carry it out. " What they cannot do is prescribe a particular purpose, and then raise and pay the money over to the advancee leaving him or her entirely free, legally and morally, to apply it for that purpose or to spend it in any way he or she chooses without any responsibility on the trustees even to inquire as to its application." [42]

[42] *Ibid.* at p. 334.

CHAPTER 20

THE FIDUCIARY NATURE OF TRUSTEESHIP

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1. REMUNERATION AND REIMBURSEMENT

THE basic principle is that a trustee acts voluntarily and is not paid for his services.[1] It does not matter whether his services are of a professional nature, as where he is a solicitor, or whether they are personal. It follows, therefore, that a trustee can only claim remuneration if he can show a specific entitlement to it; and the account that follows is essentially an account of how that entitlement can arise. It will appear that the basic principle is much honoured in its breach.

But it is also a basic principle that a trustee may recover for his legitimate out-of-pocket expenses, which include the payment of agents' fees wherever their employment is justified, calls on shares,[2] and the proper costs of litigation.[3] This right is now statutory,[4] and prevails against trust property generally, both corpus and income, and in some cases against the beneficiaries personally.[5]

[1] *Robinson* v. *Pett* (1734) 3 P.Wms. 249; *Re Barber* (1886) 34 Ch.D. 77; *Dale* v. *I.R.C.* [1954] A.C. 11 at p. 27; Nathan & Marshall, No. 90. The rule is to the contrary in many of the American States, 1937 *University of Toronto Law Journal* 50 at p. 62 (H. G. Hanbury).

[2] *Hardoon* v. *Belilios* [1901] A.C. 118; Nathan & Marshall, No. 112; *ante*, p. 236.

[3] *Ante*, p. 313. It can extend to the costs incurred by trustees in defending actions brought against them personally, save in cases of misconduct: *Re Spurling's Will Trusts* [1966] 1 W.L.R. 920.

[4] Trustee Act 1925, s. 30 (2).

[5] See generally *Stott* v. *Milne* (1884) 25 Ch.D. 710; Nathan & Marshall, No. 110; and *Re Grimthorpe* [1958] Ch. 615.

A. Remuneration Authorised by the Trust Instrument

While equity remains true to its basic principle in that it construes strictly clauses authorising remuneration,[6] it is equally true that such clauses are at the present time extremely common, and are frequently drafted in a very wide manner. Indeed, if it were not so, it would be difficult to persuade professional people to act as trustees in view of the many and complex matters that now fall to be considered. The remuneration may take the form of the income from a part of the estate.[7] A clause in a will authorising remuneration is for many purposes equivalent to a legacy.[8]

B. Remuneration Authorised by Statute

Statutory provisions enable fees to be charged by the Public Trustee,[9] by persons appointed to be Judicial Trustees,[10] and by corporations appointed as custodian trustees.[11] In this last case, the corporation concerned cannot also be a managing trustee.[12] But where a corporation is appointed to be a trustee by the court, the court has full discretion as to its fees, and is not restricted by this distinction.[13]

C. Remuneration Authorised by the Court

The court has an inherent as well as a statutory power to authorise remuneration. The power extends to trustees *de son tort*,[14] and also covers the case of a corporation appointed, other than by the court, to be a managing trustee.[15] The inherent jurisdiction is only sparingly exercised, however, and is not allowed to neutralise the principle that generally a trustee, whether or not a solicitor, cannot charge for his exertions.[16]

D. Remuneration for Litigious Work by Solicitor-Trustees

Under the rule in *Cradock* v. *Piper*,[17] a solicitor-trustee may

[6] *Re Chalinder & Herington* [1907] 1 Ch. 58; *Re Gee* [1948] Ch. 284.
[7] *Public Trustee* v. *I.R.C.* [1960] A.C. 398.
[8] *e.g.*, *Re Pooley* (1888) 40 Ch.D. 1. See also *Re Chapple* (1884) 27 Ch.D. 584.
[9] Public Trustee Act 1906, s. 9; Public Trustee (Fees) Act 1957; Administration of Justice Act, 1965, s. 2.
[10] Judicial Trustees Act 1896, s. 1.
[11] Public Trustee Act 1906, s. 4.
[12] *Forster* v. *Williams Deacon's Bank Ltd.* [1935] Ch. 359; *Arning* v. *James* [1936] Ch. 158.
[13] Trustee Act 1925, s. 42.
[14] *Brown* v. *Litton* (1711) 1 P.Wms. 140; it also extends to those who administer the trust without technically becoming trustees in any sense: *Phipps* v. *Boardman* [1967] 2 A.C. 46; and to constructive trustees, *Re Jarvis* [1958] 1 W.L.R. 815; Tiley, p. 154.
[15] *Re Masters* [1953] 1 W.L.R. 81.
[16] *Re Worthington* [1954] 1 W.L.R. 526.
[17] (1850) 1 Mac. & G. 664.

charge costs if he has acted for *a co-trustee as well as himself*[18] in respect of business done in an action or matter *in court*, provided that his activities have not increased the expenses. It is not necessary that the court action should be hostile in character, but it must be some form of litigious matter.[19] The rule will not be extended by analogies.

It may also be noted here that a solicitor-trustee may employ his *partner* in cases where it would be proper to employ an outside solicitor, provided that he himself will derive no benefit, direct *or* indirect, from such an employment.[20] This power is not restricted to matters in court, but it does not enable a solicitor-trustee to employ his own *firm*.[21] There must be complete separation of the trust work from the firm's general work, so as to make it clear that the solicitor-trustee is not involved in the former.

E. Authorisation by Contract

Trustees may contract for remuneration with those beneficiaries who are *sui juris*. But such agreements may somewhat easily be brought under the head of undue influence,[22] and are not encouraged. Nor, in fact, are they at all common.

2. Trustees must not be Purchasers

A. Purchase of the Trust Property

A trustee may not place himself in a position where trafficking in the trust property may prove to be an irresistible temptation. The general rule is that trustees are not to become the owners or lessees of trust property. This rule is independent of any question of inadequacy of price, or unfairness, or undue advantage; the sale may have been at auction and the trustee may have taken the bidding well above the reserve price, but he is still caught by the rule, which derives from his status and position and not from his conduct in the particular case.[23] Nor does it matter that he left the decision to sell and the manner of sale wholly to his co-trustee; nor that he retired from the trust before making an offer.[24] His responsibility as trustee is such that he must not contemplate the purchase at all.

[18] *Lyon* v. *Baker* (1852) 5 De G. & Sm. 622.
[19] *Re Corsellis* (1887) 34 Ch.D. 675.
[20] *Clack* v. *Carlon* (1861) 30 L.J.Ch. 639.
[21] *Christophers* v. *White* (1847) 10 Beav. 523; *Re Gates* [1933] Ch. 913; *Re Hill* [1934] Ch. 623.
[22] *Ayliffe* v. *Murray* (1740) 2 Atk. 58; *post*, p. 651 *et seq.*
[23] *Campbell* v. *Walker* (1800) 5 Ves.Jr. 678; *Ex p. Lacey* (1802) 6 Ves.Jr. 625; Nathan & Marshall, No. 87.
[24] *Wright* v. *Morgan* [1926] A.C. 788; *Re Boles and British Land Co.'s Contract* [1902] 1 Ch. 244.

The rule is not an absolute one, however. The court has a discretion to allow a sale to a trustee in a proper case. And the rule was recently held inapplicable to an executor who only acted in that capacity in a purely formal manner, who at no stage made a secret of his wish to purchase and who then disclaimed to enable him to do so.[25] But generally, a trustee or executor who has once involved himself in his office is affected by the rule for a considerable period after retirement.

The effect of the rule is that the purchase is voidable at the option of a beneficiary, who is allowed a generous time to discover the position.[26] The rule cannot be got around by sales to nominees, for a re-purchase by the trustee will be regarded as on behalf of the trust (unless the original sale was bona fide) and the right to avoid the sale is effective against a purchaser with notice of the circumstances.[27]

The court may in certain circumstances prefer to order a re-sale, and, if the price bid is higher than the previous sale price, the trustee must convey; otherwise he is held to his purchase. The trustee will not be allowed to bid at the new sale if this is objected to.[28]

B. Purchase of the Beneficial Interest

Equity's view is less stringent when dealing with a purchase by a trustee of the beneficial interest of a beneficiary. This is a type of transaction which is carefully watched; the onus is on the trustee to show "that he gave full value, and that all information was laid before the *cestui que trust* when it was sold."[29] The principles of undue influence apply; but it is open to a trustee in this type of case to show that the whole transaction was conducted at arm's length. This must however be very distinctly proved.[30]

3. Incidental Profits

A. Remedies

Profits may come to a trustee in many ways. Those which come to him by reason of his being a trustee must be handed over to the beneficiaries; indeed, the rule applies to many fiduciary agents who

[25] *Holder* v. *Holder* [1968] Ch. 353. *Cf. Re Mulholland's W.T.* [1949] 1 All E.R. 460 (option to purchase acquired before trusteeship).
[26] For a recent illustration see *Re Sherman* [1954] Ch. 653.
[27] *Silkstone and Haigh Moor Coal Co.* v. *Edey* [1900] 1 Ch. 167; *cf. Farrar* v. *Farrars Ltd.* (1888) 40 Ch.D. 395.
[28] See Cross J. in *Holder* v. *Holder* [1968] Ch. 353 at p. 371.
[29] *Per* Lord Cairns in *Thomson* v. *Eastwood* (1877) 2 App.Cas. 215 at p. 236.
[30] See generally *Coles* v. *Trecothick* (1804) 9 Ves.Jr. 234; *Morse* v. *Royal* (1806) 12 Ves.Jr. 355; Nathan & Marshall, No. 88; *cf. Williams* v. *Scott* [1900] A.C. 499.

are not trustees.[31] It is often said that a fiduciary who is required to account for such a profit becomes a constructive trustee. Such statements repeat, it is submitted, the fallacy discussed above.[32] A duty to account is a personal liability; a constructive trust is a proprietary remedy; the significance of the distinction, explained above,[32] appears where the fiduciary is bankrupt, and the question is whether the beneficiaries can claim ahead of the general creditors. We are not dealing here with the question whether the trustee's duty in respect of such profits is personal or proprietary; that question is discussed in connection with remedies in Chapter 22. We are here discussing the question of liability to account. The point of this paragraph is that the liability to account is a different question from that of a constructive trust.

B. Trustees

The rules discussed below apply in full force to trustees. Many of them apply also to other fiduciaries. Although we are mainly concerned here with trustees, it will be convenient to mention also, where relevant, the application of the rules to persons who are not strictly trustees.

i. Rule in Keech v. Sandford.[33] We have seen that the rule in *Keech* v. *Sandford*[33] prevents a trustee from keeping for his own benefit a renewal of a lease which he was able to obtain for himself by reason of his being the trustee of the original lease[34]; and even though the trustee had tried unsuccessfully to obtain a renewal for the benefit of his infant *cestui que trust*.

ii. Trustees as Company Directors. The question has arisen several times in connection with the remuneration of directorships which trustees have obtained by virtue of their position as trustees.

In *Re Macadam*,[35] trustees had power under the articles by virtue of their office to appoint two directors of a company. They appointed themselves, and were held liable to account for the remuneration which they received because they had acquired it by the use of their powers as trustees.

On the other hand, the remuneration may be retained if the

[31] *Aberdeen Town Council* v. *Aberdeen University* (1877) 2 App.Cas. 544 at p. 549, *per* Lord Cairns; *Re Macadam* [1946] Ch. 73 at p. 82, *per* Cohen J.

[32] *Ante*, pp. 225, 236.

[33] (1726) Sel.Cas.t. King 61; Nathan & Marshall, No. 77; *Re Knowles' W.T.* [1948] 1 All E.R. 866; *Protheroe* v. *Protheroe* [1968] 1 W.L.R. 519.

[34] *Ante*, p. 223.

[35] [1946] Ch. 73; *Re Francis* (1905) 92 L.T. 77; *Williams* v. *Barton* [1927] 2 Ch. 9.

trustees were directors before they became trustees [36]; or if the trustees were appointed directors independently of the votes of the shares of the trust [37]; or if the trustee did not obtain the remuneration by the use of his position as a trustee, but by an independent bargain with the firm employing him.[38] Indeed, as Cohen J. said in *Re Macadam* [39]: ". . . the root of the matter really is: Did [the trustee] acquire the position in respect of which he drew the remuneration by virtue of his position as trustee?" Trustees will not be liable even within that test if the terms of the trust authorised them to appoint themselves and receive the remuneration.[40]

iii. Other Profits by Trustees. Incidental profits come to trustees in a variety of ways and must always be disgorged. "Whenever it can be shewn that the trustee has so arranged matters as to obtain an advantage, whether in money or money's worth, to himself personally through the execution of his trust, he will not be permitted to retain, but will be compelled to make it over to his constituent." [41]

A few examples must suffice. A trustee who introduced to a firm, of which he was a member, business of the trust, was compelled to account for the profit,[42] similarly, a trustee who received a sum of £75 to induce him to retire [43] and a trustee who used trust funds in his own business was required to account for the profits he received [44]; and a trustee may be liable for profits which he ought reasonably to have received.[45]

iv. A Trustee must not be in Competition with the Trust. Conflict of Interest. A "trustee must not place himself in a position where his duty and his interest may conflict." [46] One possible area of conflict is where the trustee operates in business in competition with the trust. Such competition was inevitable in *Re Thomson* [47] where executors of a will were directed to carry on the business of the testator who had been a yacht broker. One of the executors was intending to set up on his own account as a yacht broker in competition. It was held that he must not set up in a competing business,

[36] *Re Dover Coalfield Extension Ltd.* [1908] 1 Ch. 65.
[37] *Re Gee* [1948] Ch. 284.
[38] *Re Lewis* (1910) 103 L.T. 495, as explained in *Re Gee, supra.*
[39] [1946] Ch. 73 at p. 82. Harman J. accepted this test in *Re Gee, supra.*
[40] *Re Llewellin's W.T.* [1949] Ch. 225.
[41] *Huntingdon Copper Co.* v. *Henderson* (1872) 4 R. (Court of Session) 294 at p. 308.
[42] *Williams* v. *Barton* [1927] 2 Ch. 9.
[43] *Sugden* v. *Crossland* (1856) 3 Sm. & G. 192; *Re Smith* [1896] 1 Ch. 171.
[44] *Brown* v. *I.R.C.* [1965] A.C. 244 (a Scottish solicitor compelled to account for interest earned by deposits of clients' moneys).
[45] *Re Waterman's W.T.* [1952] 2 All E.R. 1054.
[46] *Per* Lord Upjohn in *Boardman* v. *Phipps* [1967] 2 A.C. 46 at p. 123; Nathan & Marshall, No. 78.
[47] [1930] 1 Ch. 203; *Aberdeen Railway Co.* v. *Blaikie Bros.* (1854) 1 Macq. 461; *cf. Moore* v. *M'Glynn* [1894] 1 Ir.R. 74.

Clauson J. saying,[48] " . . . an executor and trustee having duties to discharge of a fiduciary nature towards the beneficiaries under the will, . . . shall not be allowed to enter into any engagement in which he has or can have a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect."

This rule applies to other fiduciaries who are not trustees. A partner is required by statute to " account for and pay over to the firm all profits made " by carrying on a business " of the same nature as and competing with that of the firm " [49] unless he has the consent of the other partners.

It is a question of fact in each case whether or not the activity is in conflict with the fiduciary duty.[50] And it appears that the rule is less strictly applied in the case of directors who are not full-time.[51]

C. Other Fiduciaries [52]

A similar rule applies to profits made by other persons in breach of a fiduciary relation; indeed such persons are grouped with trustees in many formulations of the rule. " It is an inflexible rule of a Court of Equity that a person in a fiduciary position, . . . is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict." [53] The rule has been applied to agents,[54] solicitors,[55] company directors,[56] company promoters,[57] tenants for life,[58] partners,[59] confidential employees,[60-61] and to non-commissioned officers [62] in the

48 *Re Thomson*, *supra*, at p. 215.
49 Partnership Act 1890, s. 30.
50 *Moore* v. *M'Glynn* [1894] 1 Ir.R. 74.
51 Goff & Jones, p. 453; Gower, *The Principles of Modern Company Law* (2nd ed.), pp. 496–497.
52 Goff & Jones, Chap. 35.
53 Lord Herschell in *Bray* v. *Ford* [1896] A.C. 44 at p. 51; see also Lord Cranworth in *Aberdeen Railway Co.* v. *Blaikie Bros.* (1854) 1 Macq. 461 at p. 471; *Regal (Hastings) Ltd.* v. *Gulliver* [1942] 1 All E.R. 378; [1967] 2 A.C. 134n.
54 *De Bussche* v. *Alt* (1878) 8 Ch.D. 286. And see the cases on the taking of double commission by an agent; Hanbury, *Principles of Agency* (2nd ed.), p. 67.
55 *Brown* v. *I.R.C.* [1965] A.C. 244; (1964) 80 L.Q.R. 480; Solicitors Act 1965, s. 8; The Solicitors Account (Deposit Interest) Rules 1965.
56 *Regal (Hastings) Ltd.* v. *Gulliver*, *supra*; *Selangor United Rubber Co.* v. *Cradock (No. 3)* [1968] 1 W.L.R. 1555.
57 *Erlanger* v. *New Sombrero Phosphate Co.* (1878) 3 App.Cas. 1218; *Gluckstein* v. *Barnes* [1900] A.C. 240; *Jubilee Cotton Mills* v. *Lewis* [1924] A.C. 958.
58 *Taster* v. *Marriott* (1768) Amb. 668; *Rawe* v. *Chichester* (1773) Amb. 715; *Pickering* v. *Vowles* (1783) 1 Bro.C.C. 197. But a tenant for life is not accountable in respect of tax reliefs for improvements effected under s. 73 (1) (iv) of the Settled Land Act 1925 whose cost has been repaid to him under s. 75 (2): *Re Pelly's Will Trusts* [1957] Ch. 1.
59 *Featherstonhaugh* v. *Fenwick* (1810) 17 Ves.Jr. 298; *Clegg* v. *Fishwick* (1849) 1 Mac. & G. 294.
60-61 *Triplex Safety Glass Co.* v. *Scorah* [1938] Ch. 211; *British Celanese Co.* v. *Moncrieff* [1948] Ch. 564; *British Syphon Co.* v. *Homewood* [1956] 1 W.L.R. 1190.
62 *Reading* v. *Att.-Gen.* [1951] A.C. 507.

Army. But it is not safe to make the attractive over-simplification of saying that a fiduciary must always account for all gains which come to him by reason of his fiduciary position. Indeed, Lord Herschell in the paragraph containing the above quoted statement of the rule, "plainly recognised its limitations." [63] "But I am satisfied that it might be departed from in many cases, without any breach of morality, without any wrong being inflicted, and without any consciousness of wrong-doing. Indeed, it is obvious that it might sometimes be to the advantage of the beneficiaries that their trustee should act for them professionally rather than a stranger, even though the trustee were paid for his services." [64]

Essentially the problem is one of determining the limits of the rule. "Rules of equity have to be applied to such a great diversity of circumstances that they may be stated only in the most general terms and applied with particular attention to the exact circumstances of each case." [65] If a fiduciary obtains a benefit for himself at the expense of his beneficiary, there is no difficulty. The case is one of unjust enrichment, and generally speaking, an action in the nature of a quasi-contractual action will lie. The position is more difficult where the beneficiary loses nothing; where he did not wish to make the profitable purchase which the trustee makes; where the fiduciary acted bona fide and honestly; or even where the fiduciary conferred by his activities every possible benefit on the beneficiary, but received an additional benefit for himself. A windfall has been received through the exertions of the fiduciary; the beneficiary has risked nothing, and lost nothing; should he be entitled to the profits? [66]

Lord Hodson in *Boardman* v. *Phipps* [67] answered this question in the affirmative, allowing only one exception. "The proposition of law involved in this case is that no person standing in a fiduciary position, where a demand is made upon him by the person to whom he stands in the fiduciary relationship to account for profits acquired by him by reason of his fiduciary position and by reason of the opportunity and the knowledge, or either, resulting from it, is entitled to defeat the claim upon any ground save that he made profits with the knowledge and assent of the other person." [68]

[63] Lord Upjohn in *Boardman* v. *Phipps* [1967] 2 A.C. 46 at p. 123; Nathan & Marshall, No. 78.

[64] *Bray* v. *Ford* [1896] A.C. 44 at p. 52.

[65] *Boardman* v. *Phipps, supra*, at p. 123.

[66] See generally (1968) 84 L.Q.R. 472 (G. H. Jones).

[67] [1967] 2 A.C. 46; Nathan & Marshall, No. 78; *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1888) 39 Ch.D. 339; *Lister* v. *Stubbs* (1890) 45 Ch.D. 1; *Metropolitan Bank* v. *Heiron* (1880) 5 Ex.D. 319; *Parker* v. *McKenna* (1874) L.R. 10 Ch.App. 96.

[68] *Boardman* v. *Phipps, supra*, at p. 105.

But this still leaves open the question, to be determined on the facts of each case, whether the opportunity for profit arose by reason of the fiduciary position. For example, a solicitor or a stockbroker learns, in the course of his practice, of good opportunities for investment. Having satisfied the requirements of a particular client, is he precluded from making use of this information in respect of other trusts with which he is concerned? Or for himself? Similarly with the directors of several (non-competing) companies? There is the danger that the rule, if applied inflexibly, may impose an impossible burden. As Lord Cohen said in *Boardman* v. *Phipps* [69]: ". . . it does not necessarily follow that because an agent acquired information and opportunity while acting in a fiduciary capacity he is accountable to his principals for any profit that comes his way as the result of the use he makes of that information and opportunity. His liability to account must depend on the facts of the case." Viscount Dilhorne [70] quoted Lindley L.J. as saying "to hold that a partner can never derive any personal benefit from information which he obtains from a partner would be manifestly absurd." [71]

Illegal or secret commissions or bribes obtained by a confidential servant or agent are recoverable by the principal or employer regardless of any loss by him.[72]

In *Reading* v. *Attorney-General* [73] a staff-sergeant in the British Army stationed in Cairo was paid large sums of money by Egyptians for riding in their civilian lorries carrying contraband goods and enabling the lorries to pass civilian check posts without difficulty. The British authorities seized some £30,000 of such funds in Reading's possession; later Reading petitioned to recover it. He had obtained the money wrongfully, but he argued that this fact did not mean that the British Government was entitled to claim it. Reading however failed, and one of the grounds for the decision in the House of Lords was that he, as a non-commissioned officer, was in a fiduciary relation to the Crown, and was therefore under a duty to account for the profit wrongfully made.

If the fiduciary relationship in this case is accepted, the result merely follows the earlier cases on agents. The application of the

[69] *Ibid.* at pp. 102–103; see also Lord Upjohn at p. 126.
[70] *Ibid.* at p. 90.
[71] *Aas* v. *Benham* [1891] 2 Ch. 244 at pp. 255–256.
[72] (1968) 84 L.Q.R. 472 (G. H. Jones); *Att.-Gen.* v. *Goddard* (1929) 98 L.J.K.B. 743 (bribes received by a policeman when on duty); *Reading* v. *Att.-Gen.* [1951] A.C. 507; *Brown* v. *I.R.C.* [1965] A.C. 244.
[73] [1951] A.C. 507; *Att.-Gen.* v. *Goddard* (1929) 98 L.J.K.B. 743; *Jersey City* v. *Hague* (1955) 18 N.J. 584.

rule to a policeman [74] and a staff-sergeant may be an extension; indeed it has been said that the reasoning in *Reading* v. *Attorney-General* [75] " deprives the requirement of fiduciary relationship of all meaning." [76]

Many of the difficulties relating to the application of the rule came to the fore in *Boardman* v. *Phipps*.[77]

The Phipps trust owned a substantial minority holding of shares in L. H. Company. John Phipps, the plaintiff and respondent, was one of the beneficiaries under the trust, and the defendants (appellants) were Boardman, a solicitor, and Tom Phipps, also a beneficiary. The trustees were Mrs. Phipps, an elderly widow who died in 1958, Mrs. Noble, her daughter, and Fox, an accountant. Boardman acted as solicitor to the trust.

In 1956 the appellants were dissatisfied with the way in which the affairs of the company were managed. They made various inquiries on behalf of the trust, and in that capacity obtained confidential information about the company. They learned that the value of the company's assets was high although the profits were low; and realised that it would be advantageous to sell some of the non-profit-making assets. They obtained control of the company by purchasing the remainder of the company's shares, and carried out the desired sales and reorganisation. The transaction was highly profitable. The trust gained in respect of its holding and the appellants gained in respect of the shares which they had purchased for the purpose of obtaining control.

Boardman had informed the beneficiaries and the two active trustees (Mrs. Phipps being senile and taking no part in the affairs of the trust) giving them an outline of the negotiations and asking them whether they had any objection to his taking a personal interest, bearing in mind that his initial inquiry had been on behalf of the trust. Boardman acted bona fide throughout and thought that he had made a full disclosure and had the beneficiaries' consent. Wilberforce J. however found that the respondent was justified in thinking that he had only been told half the truth. The trustees had been invited to consider whether the trust should find the money for the purchase of the shares; but the trustees were unable and unwilling to do so.

John Phipps then called upon the appellants to account for the profits which they had made from the operation.

[74] *Att.-Gen.* v. *Goddard* (1929) 98 L.J.K.B. 743.
[75] [1951] A.C. 507.
[76] Goff & Jones, p. 458.
[77] [1967] 2 A.C. 46; Nathan & Marshall, No. 78.

> Wilberforce J., the Court of Appeal and the House of Lords (3-2) held that they must account for the profits made; but having acted bona fide, they were entitled to payment on a liberal scale for the work and skill they had displayed.[78]

A number of points of importance arise from the case. First, Boardman was not, of course, a trustee. The fiduciary relation arose from the fact of his employment as solicitor to the trust. He was not, however, employed as such in the dealings in question and he claimed, as he stated at the time, to have been acting in a private capacity. The members of the House of Lords took different views on this issue. In the early negotiations with L. H. Company, the appellants, who were not shareholders in their own right, purported to represent the trust, although strictly they did not do so. So Lord Cohen, in the majority, said[79] "that information and that opportunity they owed to their representing themselves as agents for the holders of the 8,000 shares held by the trustees." Lord Upjohn, dissenting[80]: "though they portrayed themselves as representing the Phipps Trust, it is quite clear the offer was made by these two personally."

Secondly, the liability of the appellants was unaffected by the fact that the trust had lost nothing; nor that the trust had greatly benefited; nor did it matter that the Phipps Trust could not have found the money; nor that the trustees would not have wished to use the money for that purpose even if they had had it; nor that such user would have been in breach of trust, unless they had applied to the court and obtained consent to the investment.

Thirdly, it is extremely difficult to determine the limits, if any, of this inflexible rule. In *Aas* v. *Benham*,[81] Lindley L.J. laid down that information obtained in the course of a partnership business must not be used by the partners for their own benefit within the scope of the partnership business; but that they may make use of it for "purposes which are wholly without the scope of the firm's business. . . . It is not the source of the information, but the use to which it is applied, which is important in such matters."[82] This was not disapproved in *Boardman* v. *Phipps*,[83] but it seems that a stricter view there prevailed; the appellants were held accountable because they had obtained the information by purporting to uphold the trust; and although they were acting independently when they

[78] *Re Jarvis* [1958] 1 W.L.R. 815; Tiley, p. 154.
[79] *Boardman* v. *Phipps* [1967] 2 A.C. 46 at p. 103; Nathan & Marshall, No. 78.
[80] *Ibid.* at p. 120; see also Viscount Dilhorne at p. 91.
[81] [1891] 2 Ch. 244.
[82] *Aas* v. *Benham*, *supra*, at p. 256.
[83] [1967] 2 A.C. 46; Nathan & Marshall, No. 78.

made the purchase. It is submitted that it is difficult to answer Lord Upjohn's argument in dissent [84]: "I think, again, that some of the trouble that has arisen in this case, it being assumed rightly that throughout he was in such a [fiduciary] capacity, is that it has been assumed that it has necessarily followed that any profit made by him renders him accountable to the trustees. That is not so. . . . It is perfectly clear that a solicitor can if he so desires act against his clients in any matter in which he has not been retained by them provided, of course, that in acting for them generally he has not learnt information or placed himself in a position which would make it improper for him to act against them. This is an obvious application of the rule that he must not place himself in a position where his duty and his interest conflict. So, in general, a solicitor can deal in shares in a company in which the client is a shareholder, subject always to the general rule that the solicitor must never place himself in a position where his interest and his duty conflict; and in this connection it may be pointed out that the interest or duty may refer (and frequently do) to a conflict of interest and duty on behalf of different clients and have nothing to do with any conflict between the personal interest and duty of the solicitor, beyond his interest in earning his fees."

If this rule applies, the only escape of the fiduciary is that he made full disclosure, and obtained the consent of the other parties. It is not, however, clear whether the "other parties" are the trustees or the beneficiaries. Lord Guest spoke of the [85] "knowledge and assent of the trustees"; Lord Hodson says that the appellants cannot succeed unless they showed that they gave the information to and obtained consent from the respondent [86]; Viscount Dilhorne seems to suggest that either will do.[87] It is important that a person acting bona fide in these matters should know exactly what his duties are. Boardman thought that he had made full disclosure both to the trustees and to the respondents. Wilberforce J., however, held that the disclosure to the plaintiff was inadequate.[88] Boardman had obtained the consent of the two active trustees at an early stage to his taking a personal interest in the purchase. The third trustee, Mrs. Phipps, was not informed because she was then too old to take any interest in the matters of the trust.

If therefore the duty is to obtain the consent of the trustees, the failure to do so was due to a mere formality. Although trustees

[84] *Ibid.* at p. 126.
[85] *Ibid.* at p. 117.
[86] *Ibid.* at p. 112; and see Lord Cohen, "the beneficiaries," at p. 104.
[87] *Ibid.* at p. 93.
[88] [1964] 1 W.L.R. 993.

must act jointly, it does not seem to be sound to make the issue in such a case as this depend on the technicality of the addressing of a third envelope to a trustee who in fact took no part; and whose consent would have been meaningless.

If the duty is to inform the beneficiaries, the fiduciary is in a real difficulty. First, as we have seen, he runs the risk that what he bona fide thought was a disclosure may later be held inadequate. Further, there may be a real difficulty in finding and identifying all the beneficiaries; and some may be infant or unborn. It is submitted that disclosure to and the consent of the trustees should be sufficient; and that on the facts of the case, the failure to disclose to old Mrs. Phipps should not have prevented the disclosure from being sufficient.

Finally, it is important to determine what remedy was decreed in *Boardman* v. *Phipps*.[89] Wilberforce J. had held that the shares were held on constructive trust for the beneficiaries; and that Boardman was accountable for profits he made, less a sum for his skill and effort. The members of the House of Lords did not distinguish between accountability and constructive trust. Lord Guest concluded that " the appellants hold the Lester & Harris shares as constructive trustees, and are bound to account to the respondent." [90] The other members spoke of accountability only.

It was submitted above that there is a world of difference between a duty to hold specific property on trust and a duty to account. Could Boardman have satisfied the judgment by payment of the value of the shares at the time of judgment? Would a purchaser (with notice) have taken the shares subject to the same obligation as Boardman? What would have been the position if Boardman had been bankrupt? Or if he had sold the shares and placed the money in a mixed account with his own, and then gone bankrupt? None of these questions arose, and it was not necessary to discuss them. They do however raise questions of great importance and difficulty; they are discussed below under the heading of Proprietary Remedies.[91] The point here is that the duty to hold specific property as constructive trustee is very different from a duty to account; and that each of these situations is related to, but again different from, the equitable remedy of tracing.

[89] [1967] 2 A.C. 46; Nathan & Marshall, No. 78.
[90] *Ibid.* at p. 117.
[91] *Post*, p. 414.

CHAPTER 21

VARIATION OF TRUSTS

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A TRUSTEE must administer the trust according to its terms. Any deviation is a breach of trust for which the trustee will be personally liable at the instance of an injured party.[1] However, any adult beneficiary *sui juris* may deal with his equitable interest under the trust in any way he wishes; and may consent to the trustee dealing with the trust funds in a way which affects his interest.[2] Further, adult beneficiaries who together are absolutely entitled to the trust property may terminate the trust and demand that the fund be handed over to them[3]; but not if any interests are outstanding.[4]

They may wish to do this for various reasons. In *Saunders* v. *Vautier*,[2] the beneficiary wished to terminate an accumulation which was to continue until he reached 25; he was able to claim the fund at 21. If property is given to A for life and then to B, and both A and B are adult, they may each wish to have capital immediately available, and may agree to split up the fund. The most potent factor however in persuading them to do so at the present time is the

[1] *Ante*, p. 291; *post*, p. 395.
[2] *Saunders* v. *Vautier* (1841) Cr. & Ph. 240; Nathan & Marshall, No. 95.
[3] See *Re Chardon* [1928] Ch. 464; *Re Smith* [1928] Ch. 915; Nathan & Marshall, No. 40. But the trustees have a lien for estate duty liability arising in respect of settled property (F.A. 1950, s. 44).
[4] *Berry* v. *Geen* [1938] A.C. 575; *Re Robb* [1953] Ch. 459; *Re Wragg* [1959] 1 W.L.R. 922.

possibility of avoiding liability for estate duty on the death of A.[5] As explained above, duty is payable on the death of a life tenant on the whole capital value of the fund.[6] If there will be a substantial liability on the death of A, each will be better off by a decision to share out the fund now. The loser is the Revenue. The shares which each takes are a matter of negotiation; actuarial advice is often taken on the matter.

1. Methods of Division

There are various ways in which the sharing out can be arranged by agreement between the parties and without the necessity of an application to the court. The methods generally used have varied with the changes in tax and estate duty laws: mention will be made here of some of them.[7] They are mostly concerned with the problem of avoidance of estate duty upon the death of a life tenant.[8] This is because a life interest was usual in old-fashioned forms of settlement. There was no problem with discretionary trusts for there used to be no liability to estate duty upon the death of beneficiaries under a discretionary trust.[9] As explained, however, in Chapter 10, the Finance Act 1969 [10] provides for estate duty to be payable upon the death of beneficiaries under discretionary trusts who have received benefits thereunder. The termination of discretionary trusts for estate duty purposes may henceforth become a matter of importance.[11] Commonly trustees of a discretionary trust have a power to appoint on new trusts. Otherwise, except in the rare cases of all members of the discretionary class being of full age and between them absolutely entitled,[12] it will be necessary to apply to the court for approval of a variation.[13]

5 For a short account of the law relating to estate duty, see Beattie, *Elements of Estate Duty* (6th ed.), and for ways in which estate duty and tax implications affect the drafting and variation of settlements, see Potter & Monroe, and Morcom.

6 *Earl Cowley* v. *I.R.C.* [1899] A.C. 198. There is an exemption in the case of a limited interest in a spouse, where duty has been paid on the death of the first spouse: F.A. 1894, s. 5 (2); F.(1909–10)A. 1910, s. 55; F.A. 1914, s. 14; F.A. 1954, s. 32 (2) and (3), as amended by F.A. 1956, s. 36.

7 Potter & Monroe, Chap. 8.

8 *Earl Cowley* v. *I.R.C.*, *supra.*

9 *Gartside* v. *I.R.C.* [1968] A.C. 553; *ante*, p. 187.

10 s. 36.

11 On the ways in which an object of a discretionary trust or power can cease to be an object, see L.S.Gaz., Vol. 66, No. 2, p. 93; *British Tax Encyclopaedia*, Vol. 3, p. 4194; *Re Gulbenkian's Settlements* (*No.* 2) [1969] 2 All E.R. 1173.

12 *Re Smith* [1928] Ch. 915.

13 *Post*, p. 386 *et seq.*

A. Surrender of Life Interest to Remainderman

Where property is held on trust for a person for his life and after his death to others in remainder, and the life tenant does not need the income, he may be prepared to surrender his life interest in order to avoid the estate duty which would otherwise be payable upon his death. This was commonly done until 1940,[14] after which time the saving of estate duty was only effective if the life tenant survived for the period applicable to gifts inter vivos (now seven years).[15]

Such a surrender is not possible where the life tenant holds a protected life interest,[16] for an attempt to surrender would effect a forfeiture.

B. An Advancement

If the life tenant does not need all the income, he can agree to some of the capital being advanced to the remainderman, either under an express power in the trust instrument or under the statutory power of advancement.[17]

This method has the advantage that it does not involve any adjustment of an interest in the remainderman. It can therefore be employed although the remainderman is an infant. It can also be agreed to by a protected life tenant without his consent effecting a forfeiture.[18] Duty is payable however upon the life tenant's death within seven years of the advancement.[15]

C. Sale of Reversion to Life Tenant

Until 1958, this was a popular method. If the life tenant purchased the reversion with funds of his own, the remainderman was provided with immediate capital, there was no element of gift, and the life tenant's dutiable estate was reduced by the departure of the funds used for the purchase, which would otherwise have been aggregated with the trust funds for estate duty purposes. The advantages of this method however were taken away by the Finance Act 1958.[19]

D. Partition

The most common method in current use is to partition the fund in accordance with the relative values of the interests of the life

[14] F.A. 1940, s. 43; whose replacement is provided for by the Finance Act 1969; see s. 36 (2).
[15] F.A. 1968, s. 35.
[16] *Ante*, p. 173 *et seq.*
[17] T.A. 1925, s. 32; *ante*, p. 360.
[18] T.A. 1925, s. 33 (1) (i); *ante*, p. 178.
[19] F.A. 1958, s. 28; F.A. 1969, s. 38

tenant and remainderman. There is thus no element of gift to the remainderman, and, under the pre-1969 law at least, duty in the case of the life tenant's death within seven years was payable only in respect of the determination of the life interest in that part of the fund which was taken by the remainderman.[20]

2. Variations which Need the Approval of the Court[21]

We have seen that infants and persons not *sui juris* are not able to deal irrevocably with their property. If a situation arises where variations should be made to a trust in the interests of such persons, how can the variation be effected? It is hard for infants, defectives and unborn persons to be denied advantages which adults could obtain for themselves. The court, however, has no inherent jurisdiction to vary a trust in favour of infants and unborn persons.[22] There are cases however where the court can intervene; and these have been substantially increased by several statutes.

A. Inherent Jurisdiction

i. Salvage and Emergency. A court has inherent power in the case of absolute necessity to sanction the mortgage of an infant's property in order to protect the property which he retains. The jurisdiction is very narrow and is usual where expenditure is necessary to save buildings from collapse.[23] An extension of this jurisdiction allows the court in an emergency, not foreseen or anticipated by the author of the trust, to authorise the trustees to perform certain acts which are beyond the powers given to them in the trust instrument, where this is in the best interests of the trust estate and where the consent of all the beneficiaries cannot be obtained because they are not in existence or not *sui juris*.

In *Re New*,[24] the court approved a scheme of reorganisation of the capital structure of a company, splitting the shares into smaller units so that they became saleable. However in *Re Tollemache*,[25] Kekewich J. and the Court of Appeal refused to sanction a change of investment powers merely because this would be for the advantage of the beneficiaries. There was no emergency. It is clear that the jurisdiction applies to administrative matters only, and does not cover schemes for the variation of beneficial interests.

20 F.A., 1940, s. 43; Dymond, *Death Duties Supplement*, p. 25; see, however, F.A. 1969, s. 36.
21 (1954) 17 M.L.R. 420 (O. R. Marshall).
22 *Chapman* v. *Chapman* [1954] A.C. 429.
23 *Re Jackson* (1882) 21 Ch.D. 786; *Conway* v. *Fenton* (1888) 40 Ch.D. 512.
24 [1901] 2 Ch. 534.
25 [1903] 1 Ch. 457, affirmed, *ibid*. at p. 955.

ii. Compromise.[26] Until the decision of the House of Lords in *Chapman* v. *Chapman*[27] in 1954, the courts had accepted a wide definition of the word "compromise" as the basis of a useful jurisdiction to approve a variation from the terms of a trust although there was no dispute between the parties in any real sense of the term. The cases were more akin to bargains or exchanges approved by the court as being fair to infants or remaindermen, than to compromised litigation. There was dispute as to whether the jurisdiction effected a variation of beneficial interests as distinct from varying the property subject to the trusts,[28] and the jurisdiction did not extend to the redrafting of a settlement as such—there had to be some element of composition of rights.[29] But this distinction was of course paper-thin. Denning L.J., the minority judge in the Court of Appeal in the *Chapman* case, would have got round the difficulty by accepting for the courts a general juridiction to vary trusts on behalf of those unascertained or not *sui juris*, but the House of Lords preferred the other solution—that of limiting the jurisdiction to sanction compromises to cases where there was a genuine dispute. Nor could matters that did not genuinely contain an element of dispute be made to look as if they did.[30] But where there is a genuine dispute, the court of course has power to sanction a compromise.

B. Statutory Provisions (other than Variation of Trusts Act 1958)

i. Trustee Act 1925, s. 57 (1). "Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees . . . the necessary power . . . on such terms . . . as the court may think fit . . ."

This subsection overlaps the "emergency" jurisdiction discussed above,[31] and widens it by making the statutory jurisdiction available in cases of expediency rather than emergency. It operates as if its provisions were read into every settlement.[32] It is clear from

[26] 17 M.L.R. 427 (O. R. Marshall).
[27] [1954] A.C. 429.
[28] *Re Downshire Settled Estates* [1953] Ch. 218, discussing *Re Trenchard* [1902] 1 Ch. 378.
[29] *Re Chapman's S.T.* [1953] Ch. 218.
[30] *Re Powell-Cotton's Resettlement* [1956] 1 W.L.R. 23.
[31] *Ante*, p. 382.
[32] *Re Mair* [1935] Ch. 562; see also *Re Salting* [1932] 2 Ch. 57, *ante*, p. 177.

the opening words of the statute that it is only available in questions arising in the *management* or *administration* of property; it is not therefore available for the purpose of remoulding beneficial interests or for saving estate duty generally.[33]

Applications are usually made in Chambers, and it is not possible to learn from reported cases the full scope of the operation of the subsection. It has however been effectively used to authorise the sale of settled chattels,[34] and of land where necessary consents had been refused [35]; to authorise partition,[36] and to blend two charitable trusts into a single fund [37]; and, in the case of charities, to authorise wider investment powers [38]; to authorise capital money to be raised to pay a tenant for life's debts on its replacement being secured by insurance [39]; to authorise the purchase of a residence for the tenant for life [40]; and to authorise the sale of a reversionary interest which under the terms of the trust instrument was not to be sold until it fell into possession.[41]

ii. Settled Land Act 1925, s. 64 (1). "Any transaction affecting or concerning the settled land, or any part thereof, or any other land . . . which in the opinion of the court would be for the benefit of the settled land, or any part thereof, or the persons interested under the settlement, may, under an order of the court, be effected by a tenant for life, if it is one which could have been validly effected by an absolute owner."

It will be seen that this subsection is wider than Trustee Act, s. 57 (1). The transactions in respect of which the court is empowered to make an order are those which will be for the benefit of the settled land or of any persons interested under the settlement. "Transaction" is widely defined [42]; and there is no limitation restricting the court's powers to cases of management and admin-

[33] *Re Downshire S.E.* [1953] Ch. 218; *cf. Re Forster's Settlement* [1954] 3 All E.R. 714.

[34] *Re Hope's W.T.* [1929] 2 Ch. 136.

[35] *Re Beale's S.T.* [1932] 2 Ch. 15.

[36] *Re Thomas* [1930] 1 Ch. 194.

[37] *Re Harvey* [1941] 3 All E.R. 284.

[38] *Re Shipwrecked Fishermen and Mariners' Royal Benevolent Society* [1959] Ch. 220; *cf. Re Powell-Cotton's Resettlement* [1956] 1 W.L.R. 23.

[39] *Re Salting* [1932] 2 Ch. 57; *Re Mair* [1935] Ch. 562, *supra*, p. 177.

[40] *Re Power* [1947] Ch. 572; (1947) 91 S.J. 541; Snell, p. 232.

[41] *Re Cockerell's S.T.* [1956] Ch. 372.

[42] S.L.A. 1925, s. 64 (2), defines "transactions" as including "any sale, extinguishment of manorial incidents, exchange, assurance, grant, lease, surrender, reconveyance, release, reservation, or other disposition, and any purchase or other acquisition, and any covenant, contract, or option, and any application of capital money (except as hereinafter mentioned), and any compromise or other dealing, or arrangement; but does not include an application of capital money in payment for any improvement not authorised by this Act, or by the settlement."

istration.[43] The subsection enables the court to effect the alteration of beneficial interests in such a way as to reduce estate duty liability,[44] and was the most effective vehicle for this purpose before 1958. It applies however only to cases of settled land, and to land held on trust for sale,[45] and not to the ordinary case of a personalty settlement.

iii. Trustee Act 1925, s. 53.[46] Under section 53 the court is given power to make an order authorising certain dealings with an infant's property "with a view to the application of the capital or income thereof for the maintenance, education, or benefit of the infant." As with section 57, the section overlaps and extends the inherent power to make provision for the maintenance of infants. The word "benefit" has been widely construed, and the court may authorise transactions whose object is the reduction of estate duty for the infant's benefit.[47] Thus, entails have been barred in order to exclude the interests of large numbers of remote beneficiaries with a view to raising money for the infant's benefit[48] or to simplifying an application to the court under the Variation of Trusts Act 1958[49]; and reversionary interests have been sold to the tenant for life.[50] However, the proceeds of sale should be resettled; this will be an "application" for the infant's benefit[51]; while an outright payment to him of the proceeds of sale will not be.[52]

iv. Matrimonial Causes Act 1965, s. 17. This section gives wide powers to a court pronouncing a decree of divorce or nullity to vary the trusts contained in an ante- or post-nuptial settlement which has been made for the benefit of the parties or their children. The jurisdiction includes the alteration of beneficial interests. This should not be done to punish the guilty spouse.[53] It is no objection that the alteration effects a saving of estate duty.[54] The purchase of a house

[43] It is used for such purposes. *Re White-Popham's S.E.* [1936] Ch. 725; *Re Scarisbrick's Re-Settlement Estates* [1944] Ch. 229; *Re Mount Edgcumbe* [1950] Ch. 615; *Re Rycroft's Settlement* [1962] Ch. 263.

[44] *Re Downshire S.E.* [1953] Ch. 218.

[45] *Re Simmons* [1956] Ch. 125; L.P.A. 1925, s. 28.

[46] (1957) 21 Conv.(N.S.) 448 (O. R. Marshall).

[47] *Re Meux* [1958] Ch. 154.

[48] *Re Gower's Settlement* [1934] Ch. 365.

[49] *Re Bristol's S.E.* [1964] 3 All E.R. 939; *Re Lansdowne's W.T.* [1967] Ch. 603.

[50] *Re Meux, supra. Cf. Re Heyworth's Contingent Reversionary Interest* [1956] Ch. 364; no fiscal advantages would result from this transaction; F.A. 1958, s. 28; F.A. 1969, s. 38; *ante*, p. 381.

[51] *Re Meux, supra.*

[52] *Re Heyworth's Contingent Reversionary Interest, supra*; criticised (1957) 21 Conv.(N.S.) 448 at pp. 450–454 (O. R. Marshall).

[53] *Ulrich* v. *Ulrich* [1968] 1 All E.R. 67.

[54] *Thomson* v. *Thomson and Whitmee* [1954] P. 384.

before marriage, intended to be the matrimonial home, has been held to be an ante-nuptial settlement for the purposes of the section.[55]

C. Variation of Trusts Act 1958 [56]

The Variation of Trusts Act 1958 gives to the court a "very wide and, indeed, revolutionary discretion" [57] to approve on behalf of four groups of persons [58] "any arrangement . . . varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts." [59] On its terms, this provision covers not only administrative matters, but also variations in the beneficial interests. In practice, the jurisdiction is primarily used to vary the provisions of family settlements so as to reduce liability to estate duty [60] or taxation.[61] "Nearly every variation that has come before the court has tax avoidance for its principal object; and no one has ever suggested that this is undesirable or contrary to public policy." [62]

This duty-saving aspect of the jurisdiction is politically controversial. On the one hand, it may be asked why those families who have had the benefit of the best legal advice to establish settlements which were suitable when they were made should be now allowed to make use of a new jurisdiction to escape from those trusts when they become fiscally burdensome. On the other, it is argued that the court's inability to approve, where infants and unborn are concerned, variations of trusts which would have been effected between the parties if adult and *sui juris* was a paradoxical way of protecting the interests of infants and unborn.[63] The Act now gives the power, but the court may only approve such an arrangement if the carrying out thereof would be for the benefit of the person on whose behalf the approval is given.[64]

i. Persons on whose Behalf Approval may be Given. In selecting the classes of persons on whose behalf approval may be given, the

55 *Ulrich* v. *Ulrich*, *supra*.

56 (1958) 22 Conv.(N.S.) 373 (M. J. Mowbray); (1963) 27 Conv.(N.S.) 6 (D. M. Evans); (1965) 43 Can.B.R. 181 (A. J. Maclean); (1969) 33 Conv.(N.S.) 113 (J. W. Harris). The Act was based on the recommendations of the L.R.C. Sixth Report (Court's Power to Sanction Variations of Trusts), Cmnd. 310. The jurisdiction given by the Act is independent of T.A., 1925, s. 57, and S.L.A. 1925, s. 64, *ante*, p. 383. The jurisdiction of the 1958 Act should be invoked in preference to that of T.A. 1925, s. 57.

57 *Per* Evershed M.R. in *Re Steed's W.T.* [1960] Ch. 407 at pp. 420–421.

58 *Post*, p. 387.

59 V.T.A. 1958, s. 1 (1).

60 *Post*, p. 392.

61 *Re Sainsbury's Settlement* [1967] 1 W.L.R. 476 (capital gains tax).

62 *Per* Lord Denning in *Re Weston's Settlements* [1969] 1 Ch. 223 at p. 245.

63 L.R.C. Report, *supra*, paras. 12–14.

64 Except for persons in para. (*d*). *Post*, p. 390.

principle is that the court is not asked to approve on behalf of ascertainable adults who can consent for themselves. The classes (as set out in Variation of Trusts Act 1958, s. 1) are:

> "(*a*) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting, or
>
> (*b*) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the court, or
>
> (*c*) any person unborn, or
>
> (*d*) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined."

Paragraph (*b*) may well of course include adults; but because the class is ascertainable only at a future time, its members cannot yet be known. Under the proviso, however, those who would qualify if the future event happened at the date of the application to the court must themselves consent. If however they are infants, they come within paragraph (*c*).

> In *Re Suffert*,[65] income was given under protective trusts to a spinster for life, and, in the event of her having no issue, and subject to a general testamentary power, in trust for those who would become entitled under her intestacy. She had three adult cousins, who would be entitled in equal shares to her estate if she had died at the date of the application to the court. One cousin was made a party, and consented, but the others were not. In asking the court to approve the arrangement, it was argued that the court should approve on behalf of those who would be entitled on intestacy, as they came within paragraph (*b*). Buckley J. however held that the proviso applied and that he could not approve on behalf of the other cousins. Otherwise he approved the arrangement.

ii. Parties. In general, the settlor, if living,[66] and all beneficiaries under the trusts, both adult and infant, should be made parties. In

[65] [1961] Ch. 1.
[66] R.S.C., Order 55, r. 14 (1) (3A).

the case of a class, those who are members of the class at the date of the application should be included [67]; but it is not necessary to join persons who may become members later [68]; nor persons who may become interested under discretionary trusts [69]; nor those who are possible objects of a power.[70] Persons unborn cannot of course be made parties, but their interests must be represented. Where a mental patient is involved the Court of Protection should be informed as soon as the originating summons has been issued and proceedings then taken in the Court of Protection to look after the interests of the patient.[71]

iii. Foreign Trusts. The jurisdiction is not confined to trusts which are governed by English law.[72] Also it has been held that the court may approve the revocation of an English settlement when the funds were to be transferred to an almost indentical Canadian settlement with Canadian trustees, the beneficiaries having emigrated to Canada.[73] A similar application was refused where the connection with Jersey was recent and tenuous, and where the court doubted whether the living beneficiaries really intended to make Jersey their home.[74]

iv. Effect of Approval by the Court. It appears that the arrangement is effective from the time of the approval by the court. The reasons why this is so are not clear; and the result may be due to the practice established by *Re Viscount Hambleden's Will Trusts*.[75] Several, and in some cases conflicting, accounts have been given of the effect of approval by the court.

In *Re Joseph's Will Trusts* [76] Vaisey J. included in his order approving the variation a direction that the variation should be carried into effect. In *Re Viscount Hambleden's Will Trusts*,[77] Wynn-Parry J. thought that he had no jurisdiction to make such a direction. Nor was it required. "I hold that the effect of my approval is effective for all purposes to vary the trusts." [78] In *Re Holt's Settlement*,[79] Megarry J. was unconvinced. Before him it was argued that the Act

67 *Re Suffert's Settlement* [1961] Ch. 1.
68 *Re Moncrieff's S.T.* [1962] 1 W.L.R. 1344.
69 *Re Munro's S.T.* [1963] 1 W.L.R. 145.
70 *Re Christie-Miller's Marriage Settlement* [1961] 1 W.L.R. 462.
71 *Practice Direction* [1960] 1 W.L.R. 17; *Re Sanderson's W.T.* [1961] 1 W.L.R. 36.
72 *Re Ker's S.T.* [1963] 1 All E.R. 801; *Re Paget's Settlement* [1965] 1 All E.R. 58.
73 *Re Seale's Marriage Settlement* [1961] Ch. 574; *Re Windeatt's W.T.* [1969] 1 W.L.R. 692.
74 *Re Weston's Settlements* [1969] Ch. 223.
75 [1960] 1 W.L.R. 82; *Re Holt's Settlement* [1969] 1 Ch. 100 at p. 113.
76 [1959] 1 W.L.R. 1019.
77 [1960] 1 W.L.R. 82.
78 *Ibid.* at p. 86.
79 [1969] 1 Ch. 100; (1968) 84 L.Q.R. 162 (P. V. B.).

gives the court power to approve only on behalf of the persons mentioned in section 1 (1) [80]; and the consent of the adults to a change in their beneficial interests was a "disposition," and ineffective unless in writing.[81] Megarry J. was reluctant to disturb what had become a very convenient practice based on *Re Viscount Hambleden*,[77] and searched for a theory to justify it. The suggestion that there was no "disposition" of the interests of the consenting adults, but a "species of estoppel" [82] operating against them was "unattractive." He was satisfied however that it could be explained on the ground that a "not impossible" [83] construction of the Act was that the court's jurisdiction was that of approving arrangements which did in fact vary the trusts, section 53 (1) (*c*) [84] being by necessary implication excluded; or that, where the variation was made for consideration, the consenting adults could be compelled to perform their contract and that they held their original interests on constructive trusts, these being unaffected by section 53 (1) (*c*).[85] The view that the variation obtains its effect by reason of the consent of the beneficiaries is supported by dicta in *I.R.C.* v. *Holmden*,[86] where however the question of section 53 (1) (*c*) did not arise.

The arrangement coupled with the court's order is an "instrument" for the purposes of the Perpetuities and Accumulations Act 1964, s. 15 (5), and future interests or accumulations permitted by the Act, which only applies to instruments coming into operation after July 16, 1964,[87] may be provided for in an arrangement.[88] A variation which is inconsistent with the continuous existence of a power operates as a release of a power.[89]

v. Principles Applicable to the Exercise of the Discretion. The jurisdiction, as we have seen, is very wide. It is however a jurisdiction to "vary" and not to "resettle." [90] Nor will it be exercised if the variation involves a fraud on a power, as for example where

[80] There is a clear contrast between the wording of this section and that of S.L.A. 1925, s. 64, and T.A. 1925, s. 57.
[81] L.P.A. 1925, s. 53 (1) (*c*); *supra*, p. 119; *Grey* v. *I.R.C.* [1960] A.C. 1.
[82] [1969] 1 Ch. 100 at p. 114.
[83] *Ibid.* at p. 115.
[84] L.P.A. 1925, providing that the disposition of subsisting equitable interests should be in writing; *ante*, p. 119.
[85] L.P.A. 1925; *Oughtred* v. *I.R.C.* [1960] A.C. 206; Nathan & Marshall, No. 21; *Re Holt's Settlement* [1969] 1 Ch. 100 at pp. 115–116.
[86] [1968] A.C. 685; *cf.* T.A. 1925, s. 57; *Re Mair* [1935] Ch. 562.
[87] Perpetuities and Accumulations Act 1964, s. 12.
[88] *Re Lansdowne's W.T.* [1967] Ch. 603; *Re Lloyd's Settlement* [1967] 2 W.L.R. 1078; *Re Holt's Settlement*, *supra*.
[89] *Re Christie-Miller's Marriage Settlement* [1961] 1 W.L.R. 462; *Re Courtauld's Settlement* [1965] 1 W.L.R. 1385; *Re Ball's S.T.* [1968] 1 W.L.R. 899; *ante*, p. 116.
[90] *Re Ball's S.T.* [1968] 1 W.L.R. 899; criticised (1968) 84 L.Q.R. 458 (P. V. B.); *Re Holt's Settlement* [1969] 1 Ch. 100 at p. 117; *post*, p. 393.

property is held on trust for A for life and to such of A's children as he shall appoint, and A, in order to avoid estate duty liability on his death, appoints in favour of his living children, and does so with a view to partitioning the fund, with the court's approval, between his children and himself. Such an appointment has been held to be fraudulent and void on the ground that it was made so that the appointor may obtain a benefit for himself under the variation.[91]

It is necessary that the variation should be for the benefit of the persons in categories (*a*) and (*c*) on whose behalf approval is sought. There is no such requirement of benefit in respect of persons under category (*d*).[92]

In giving approval, the court must be satisfied about the arrangement as a whole.[93] One important factor is whether or not the arrangement is consistent with the general plan of the settlor or testator.

> In *Re Steed's Will Trusts*[94] a testator had left property to a faithful housekeeper for her life on protective trusts and after her death as she should appoint, the trustees having power to pay capital moneys to her as they should think fit. The property included a farm which was let to the housekeeper's brother; and the terms of the will were designed so as to give the maximum benefit in the property to the housekeeper, without giving her an absolute interest because of the danger which the testator "thought was real, of being, to use a common phrase, sponged upon by one of her brothers."[95]
>
> The trustees decided to sell the farm. The housekeeper started proceedings to stop them, exercised the power of appointment in favour of herself, and applied under the Variation of Trusts Act, s. 1, for the elimination of the protective element in her life interest; ". . . the result would be that the plaintiff would become absolutely entitled to the property, because she would then be the life tenant, having appointed . . . to herself the reversion."[96] The only persons who might be prejudiced by such a variation would be those who might benefit under the discretionary trusts which would arise if the protective life interest were forfeited[97]; and under paragraph (*d*), the court

91 *Re Robertson's W.T.* [1960] 1 W.L.R. 1050; *Re Brook's Settlement* [1968] 1 W.L.R. 1661; *cf. Re Wallace's Settlement* [1968] 1 W.L.R. 711.
92 V.T.A. 1958, s. 1, proviso. See *Re Van Gruisen's W.T.* [1964] 1 W.L.R. 449.
93 *Re Burney's S.T.* [1961] 1 All E.R. 856.
94 [1960] Ch. 407.
95 *Ibid.* at p. 415.
96 *Ibid.* at p. 419.
97 *Ante*, p. 387; assuming that she would not now have children, this was only a prospective husband, described in the case as the "spectral spouse."

is not concerned to see that they benefit from a variation. Was there any reason why approval should not be given?

The Court of Appeal refused. "It is the *arrangement*[98] which has to be approved, not just the limited interest of the person on whose behalf the court's duty is to consider it . . . the court must regard the proposal as a whole, and so regarding it, then ask itself whether in the exercise of its jurisdiction it should approve that proposal on behalf of the person who cannot give a consent . . . it was part of the testator's scheme, made as I think manifest by the language which I have read from the clauses in the will, that it was the intention and the desire of the testator that this trust should be available for the plaintiff so that she should have proper provision made for her throughout her life, and would not be exposed to the risk that she might, if she had been handed the money, part with it in favour of another individual about whom the testator felt apprehension, which apprehension is plainly shared by the trustees."[99]

The court must also consider the general welfare of the persons on whose behalf approval is sought; this does not necessarily coincide with their financial interest.

In *Re Weston's Settlements*,[1] two settlements had been made in 1964, one in favour of each of the settlor's sons (both young men and one still an infant) and their children. The settlor moved to Jersey in 1967, and the sons followed him. The application was for the appointment of new trustees under Trustee Act 1925, s. 41,[2] and for the insertion into the settlements of a power for the trustees to discharge the trusts of the settlements and to create almost identical Jersey settlements. The object was to take advantage of the favourable fiscal situation in Jersey, relating to capital gains tax and to estate duty. The Court of Appeal, affirming Stamp J.,[3] refused. The variation would make the beneficiaries richer but would not be for their benefit. "The court should not consider merely the financial benefit to the infant and unborn children, but also their educational and social benefit. There are many things in life more worth while than money. One of these things is to be brought up in this our England, which is still 'the envy of less happier lands.' I do not believe that it is for the benefit of children to be uprooted from

98 Italics supplied.
99 [1960] Ch. 407 at pp. 421–422.
1 [1969] 1 Ch. 223.
2 *Ante*, p. 301.
3 [1969] 1 Ch. 223.

England and transported to another country simply to avoid tax . . . many a child has been ruined by being given too much.[4] The avoidance of tax may be lawful, but it is not yet a virtue. The Court of Chancery should not encourage or support it—it should not give its approval to it—if by so doing it would imperil the true welfare of the children, already born or yet to be born." [5]

vi. Ways in which the Discretion has been Exercised. The courts have approved a wide variety of variations, and, in addition to approving changes in the beneficial interests, have inserted a power of advancement,[6] terminated an accumulation,[7] inserted an accumulation period [8] and have widened the investment powers of trustees.[9] Investment clauses are now rarely the subject of an application, for it has been held that only in exceptional circumstances should a court give its approval to wider investment powers than those given to trustees in the Trustee Investments Act 1961 [10]; and trustees automatically have those powers unless expressly excluded in an instrument coming into operation after the date of the Act.[11] It is of course in connection with schemes which vary beneficial interests for the purpose of saving estate duty that the Act is mainly applied.

(a) *Variation of Beneficial Interests for Fiscal Reasons.* Beneficial interests may be varied in order to reduce estate duty,[12] capital gains tax,[13] or income tax or surtax.[14] The application should be made by a beneficiary, usually the person currently receiving the income; it is not usually satisfactory for the trustees to make the application because there might be an undesirable conflict of interest between their interest as an applicant, and as guardian of some of the beneficial interests for which they are responsible.[15]

In drafting the arrangement which the court will be asked to approve, care should be taken to ensure that the interests of every possible beneficiary have been attended to.[16] Every adult must consent; infants and unborn persons must be given interests which are more beneficial than those which they were to enjoy under the old

4 Each settlement was worth some £400,000.
5 [1969] 1 Ch. 223 at p. 245.
6 *Re Lister's W.T.* [1962] 1 W.L.R. 1441.
7 *Re Tinker's Settlement* [1960] 1 W.L.R. 1011.
8 *Re Lansdowne's W.T.* [1967] Ch. 603; *Re Holt's Settlement* [1969] 1 Ch. 100.
9 *Re Coates' Trusts* [1959] 1 W.L.R. 375; *Re Burney's S.T.* [1961] 1 W.L.R. 545.
10 *Re Kolb's W.T.* [1962] Ch. 531; *Re Cooper's Settlement* [1962] Ch. 826; *Re Clarke's W.T.* [1961] 1 W.L.R. 1471.
11 T.I.A. 1961, s. 3; *ante*, p. 320.
12 *Re Druce's S.T.* [1962] 1 W.L.R. 363.
13 *Re Sainsbury's Settlement* [1967] 1 W.L.R. 476.
14 *Re Clitheroe's S.T.* [1959] 1 W.L.R. 1159.
15 *Re Druce's S.T., supra.*
16 Though persons within para. (*d*) of s. 1 (1) need not be benefited; *Re Steed's W.T.* [1960] Ch. 407; *Re Burney's S.T.* [1961] 1 W.L.R. 545.

settlement. There is usually no difficulty over this. If the capital of the settlement is shared out between the various beneficiaries, the interests of the remainderman will be accelerated; and as the liability to estate duty on the death of the life tenant will be avoided (provided he survives for seven years) [17] a larger sum of money will be available for them even though the life tenant will take a share of the capital. The risk of death within seven years is usually insured against by a single premium policy paid for by the life tenant. It is also usual for the life tenant to pay the costs of the application.

(b) *Lack of Benefit.* There is usually no difficulty in showing a financial benefit where it can be shown that estate duty would be saved. Successful applications are a daily event, and only a small proportion of applications are reported. The court will not approve where the benefit is a matter of chance, but it will not always require absolute certainty of benefit,[18] if the risk is one a "prudent and well advised adult would be prepared to take." [19] Most risks can be covered by insurance.

Approval will not be given where a settlement creates an inequality between children, and the application is to vary the settlement so as to give a benefit to those deprived at the expense of those favoured.[20] Nor will approval be given to an arrangement which provides that a gift for grandchildren should take effect at a future date instead of at the death of a person. Estate duty would be saved but the class would close at a different time, and would thus prejudice some members.[21] Nor is it for the benefit of an infant that property in which he will become absolutely entitled should be settled on protective trusts [22]; but the date of vesting of an infant's interest may in suitable cases be postponed.[23] "The word 'benefit' . . . is . . . not confined to financial benefit, but may extend to moral and social benefit" [24]; and, as we have seen, financial benefit may be overridden by other disadvantages.[25] It is clear that the courts are now unconcerned with the difficulties which Lord Morton experienced in *Chapman* v. *Chapman*.[26] Tax avoidance is acceptable; but fiscal considerations do not override all others.[27]

[17] F.A. 1968, s. 35.
[18] *Re Cohen's W.T.* [1959] 1 W.L.R. 865; *Re Holt's Settlement* [1969] 1 Ch. 100.
[19] (1960) 76 L.Q.R. 22 (R. E. M.).
[20] *Re Tinker's Settlement* [1960] 1 W.L.R. 1011.
[21] *Re Cohen's S.T.* [1965] 1 W.L.R. 1229.
[22] *Re T.'s S.T.* [1964] Ch. 158.
[23] *Per* Megarry J. in *Re Holt's Settlement*, *supra*; *Re Weston's Settlements* [1969] 1 Ch. 223.
[24] *Re T.'s Settlement*, *supra*; *Re Holt's Settlement*, *supra*; *Re Ball's S.T.* [1968] 1 W.L.R. 899.
[25] *Re Weston's Settlements*, *supra*, *ante*, p. 391.
[26] [1954] A.C. 429.
[27] *Cf. Re Drewe's Settlement* [1966] 1 W.L.R. 1518.

CHAPTER 22

BREACH OF TRUST

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1. Personal Liability to Beneficiaries

A. General

i. Liability is Compensatory. A trustee who fails to comply with the duties imposed upon him by equity and by the trust instrument is liable to make good to the beneficiaries the loss to the trust estate.[1] This liability is independent of fraud, intent or personal incompetence; it exists where the breach is innocent or merely technical. The object of the rule is not to punish the trustee, but to compensate the beneficiaries. However, the court will, on suitable occasions, authorise acts which are technical breaches of trust; a trustee will not be liable for a technical breach which the court would have authorised[2]; but there is no need to take the risk; he should obtain the directions of the court before acting.[3]

ii. Liability is Personal, not Vicarious. The rule has always been that a trustee is liable for his own breaches and not for those of his co-trustees.[4] The dividing line however is extremely difficult to draw; for if there is a breach by a co-trustee, the trustee may himself be at fault by leaving the matter in the hands of a co-trustee without inquiry, or for standing by while a breach of trust is being committed,[5] or for allowing trust funds to remain in the sole control of a co-trustee, or for failing to take steps to obtain redress on becoming aware of a breach of trust.[6]

It became common to insert indemnity clauses protecting trustees from innocent and passive breaches of trust, and such a clause became statutory in the Act of 1859, s. 31, which is essentially the same as Trustee Act 1925, s. 30,[7] considered above.[8] The Act of 1859 was strictly construed, and Lord Selborne went so far as to say that "It does not substantially alter the law as it was administered by Courts of Equity."[9] It is probable however that the wide definition

[1] In some cases the liability of a constructive trustee is different; *ante*, p. 219.
[2] *Lee* v. *Brown* (1798) 4 Ves.Jr. 362 at p. 369; *Brown* v. *Smith* (1878) 10 Ch.D. 377.
[3] *Ante*, p. 325.
[4] *Townley* v. *Sherborne* (1634) J.Bridg. 35 at pp. 37, 38; Nathan & Marshall, No. 113.
[5] *Bahin* v. *Hughes* (1886) 31 Ch.D. 390; Nathan & Marshall, No. 122; *ante*, p. 295.
[6] For further details see Nathan & Marshall, pp. 456–457.
[7] "A trustee shall be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker or other person with whom any trust money or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default."
[8] *Ante*, p. 351.
[9] *Re Brier* (1884) 26 Ch.D. 238 at p. 243; *ante*, p. 347; *Underwood* v. *Stevens* (1816) 1 Mer. 712.

of the phrase "wilful default" which was applied in *Re Vickery* [10] to a case of a trustee leaving the money in the hands of a solicitor will now also be applied to the question of the liability of a trustee for the acts of his co-trustee.

iii. Breaches before Appointment. A trustee is not liable for breaches of trust committed before his appointment in the absence of evidence indicating a breach of trust.[11] On appointment, however, he should examine the books and documents relating to the trust, and should ensure that the trust property is vested in him. If in the course of his inquiries he discovers a breach of trust, he should take steps against the former trustees; unless for some reason he can show that such proceedings would have been useless.[12]

iv. Breaches after Retirement. A trustee remains liable after retirement for breaches committed by him during his term of office; and similarly his estate remains liable after his death. He may on the other hand have been released by the other trustees, or by the beneficiaries being *sui juris* and in possession of all the facts. He will not usually be liable in respect of breaches committed after his retirement; but he may be if he retired in order to facilitate a breach of trust. "Did" (the retiring trustees) asked Kekewich J. "denude themselves of the trust funds under circumstances that warranted any reasonable belief of the insecurity of the trust funds in the hands of those to whom they committed them?" [13]

v. Trustee-Beneficiary. Where the trustee in breach is also a beneficiary, his beneficial interest bears the loss as against the other beneficiaries,[14] and as we will see,[15] against the trustees [16]; and this liability applies although the beneficial interest was acquired by him derivatively, even by purchase.[17]

B. Measure of Liability

The measure of liability is the loss caused to the trust estate, directly or indirectly.[18] Rules of remoteness, such as those applicable

10 [1931] 1 Ch. 572; Nathan & Marshall, No. 94; *ante*, p. 347.
11 *Re Strahan* (1856) 8 De G.M. & G. 291.
12 *Re Forest of Dean Coal Co.* (1878) 10 Ch.D. 450 at p. 452.
13 *Head* v. *Gould* [1898] 2 Ch. 250 at p. 272; Nathan & Marshall, No. 124. This question has recently come into prominence in the context of pressure upon English resident trustees to retire in favour of foreign resident trustees in order to allow a trust fund to escape liability for capital gains tax: *Re Weston's Settlements* [1969] 1 Ch. 223; *ante*, p. 391.
14 *Re Dacre* [1915] 2 Ch. 480; [1916] 1 Ch. 344; *Re Towndrow* [1911] 1 Ch. 662. Assignees are also bound, unless they took for value and without notice.
15 *Post*, p. 402.
16 *Chillingworth* v. *Chambers* [1896] 1 Ch. 685.
17 *Jacubs* v. *Rylance* (1874) 17 Eq. 341; *Doering* v. *Doering* (1899) 42 Ch.D. 203; *Re Dacre, supra.*
18 *Knott* v. *Cottee* (1852) 16 Beav. 77; see also Nathan & Marshall, p. 459.

in actions in contract or tort, are not relevant. But a number of subsidiary rules have been established as being applicable to the particular situations.

i. Purchase of Unauthorised Investments. When trustees make an unauthorised investment, they will be liable for the loss incurred on the sale. This is so even if the sale is at a time chosen by the court, and if the investments would have shown a profit if they had been retained until the decision of the court holding them to be improper.[19] The beneficiaries may, if they are *sui juris* and so wish, adopt the unauthorised investment[20]; if they do so, there is dispute whether that is the limit of their[21] remedy, or whether they may claim the difference between the value of the investment and the purchase price.[22]

ii. Improper Retention of Investments. It is necessary to distinguish between authorised and unauthorised investments.

(a) *Unauthorised Investments.* A trustee who improperly retains unauthorised investments is liable for the difference between the present value (or selling price) and the price which it would have raised if it had been sold at the proper time.[23] How hard this can be on a trustee holding property in a falling market is shown by *Fry* v. *Fry*[23]

> where trustees were liable for the difference between the price offered for a hotel in 1837 which they refused as inadequate, and the much lower price prevailing in 1859, the fall being largely due to the diversion of road traffic by the building of a railway.

(b) *Authorised Investments.* Before 1961 a trustee was not liable for loss occasioned by the retention of an unauthorised investment, unless he was guilty of wilful default.[24] We have seen that the Trustee Investments Act 1961, s. 6 (2), requires advice to be taken on the question of retaining investments.[25] Trustee Act 1925, s. 4,[26] has no application either to such cases, nor to those to which it is expressly made inapplicable by Trustee Investments Act 1961, s. 3 (4).[27]

iii. Improper Sale of Authorised Investments. Where an authorised investment was improperly sold, the trustees may be

19 *Knott* v. *Cottee*, *supra*.
20 *Re Patten* (1883) 52 L.J.Ch. 787; *Re Jenkins and Randall's Contract* [1903] 2 Ch. 362; *Wright* v. *Morgan* [1926] A.C. 788 at p. 799.
21 *Thornton* v. *Stokill* (1855) 1 Jur.(N.S.) 751.
22 *Re Lake* [1903] 1 K.B. 439.
23 *Fry* v. *Fry* (1859) 27 Beav. 144; Nathan & Marshall, No. 115.
24 *Re Chapman* [1896] 2 Ch. 763; *Rawsthorne* v. *Rowley* [1909] 1 Ch. 409n.
25 *Ante*, p. 322.
26 *Ante*, p. 322.
27 *Ante*, p. 321.

called upon to account for the proceeds of sale or to replace the investment, at the choice of the beneficiaries. Thus where trustees sold consols and invested in an unauthorised investment, the whole matter was treated as a single transaction and the trustees were held liable to replace the consols at the higher price then prevailing.[28] This is so even though the improper investment was realised without loss.[29]

iv. Failure to Invest. Trustees should invest within a reasonable time. Pending investment, moneys may be paid into a bank to a deposit or other account.[30] Interest should be obtained if possible; a trustee who unreasonably fails to find an investment will be chargeable with interest.[31]

If a trustee is required to invest in a specific investment and fails to make any investment, and the price of the specific investment has risen, he will be liable to purchase as much of that investment as would have been purchased at the proper time.[32] Similarly if he chooses an investment other than that specified[33]; profit in the unauthorised investment being surrendered, of course, to the trust.[34] Where, as is nearly always the case in practice, the trustees may select investments at their discretion, it is not practicable to base recovery upon the price of a particular investment, and the beneficiary will usually be entitled only to recovery of the trust fund with interest.[35]

v. Employment of Trust Funds in Trade. A trustee who employs trust funds in his trade or business is liable as a constructive trustee for the profits he makes,[36] or for the sums involved with interest, whichever is the greater. Difficult questions arise when he employs a mixed fund, being partly his own and partly trust money. Here the rule is that the beneficiaries may claim a share of the profits which relate to the proportion of the trust fund employed,[37] or demand the return of the trust money with interest.[38]

vi. Mortgage of Realty. We have seen that where trustees lend an excessive sum on a mortgage of realty which would have been a

28 *Phillipson* v. *Gatty* (1848) 7 Hare 516; Nathan & Marshall, No. 116.
29 *Re Massingberd's Settlement* (1890) 63 L.T. 296.
30 T.A. 1925, s. 11 (1).
31 See Nathan & Marshall, p. 463.
32 *Byrchall* v. *Bradford* (1822) 6 Madd. 235.
33 *Pride* v. *Fooks* (1840) 2 Beav. 430.
34 *Post*, p. 399.
35 *Shepherd* v. *Mouls* (1845) 4 Hare 500; *cf. Watts* v. *Girdlestone* (1843) 6 Beav. 188.
36 See Nathan & Marshall, p. 464; *Re Jarvis* [1958] 1 W.L.R. 815; Tiley, p. 154.
37 *Lord Provost, etc., of Edinburgh* v. *Lord Advocate* (1879) 4 App.Cas. 823; *Re Tilley's W.T.* [1967] Ch. 1179.
38 *Heathcote v. Hulme* (1819) 1 Jac. & W. 122.

proper investment for a smaller sum, the mortgage is treated as an authorised investment for the smaller sum and the trustees are liable only for the excess, with interest.[39]

vii. Interest. The liability of a trustee to replace trust money carries with it interest, usually at 4 per cent.[40] The rate of interest is, however, at the discretion of the court, and will be increased to 5 per cent. where the trustee has been guilty of fraud[41] or active misconduct,[42] where he has traded with the money,[43] or where he ought to have received more than 4 per cent.[44] If he has received more than 5 per cent. he is accountable for what he has actually received, for the beneficiaries may adopt the investment.[45] Simple or compound interest, the latter with yearly[46] or sometimes with half-yearly rests,[47] will be ordered in the court's discretion[48]; compound interest is usual where there is a trust for accumulation.[49]

viii. Profit in One Transaction: Loss in Another. Any gains made out of the trust property belong to the beneficiaries while a loss incurred by reason of a breach of trust must be made good by the trustee. A trustee cannot set off a gain in one transaction against a loss made in another unauthorised transaction.

In *Dimes* v. *Scott*[50] trustees retained an unauthorised Indian mortgage returning 10 per cent. all of which was paid to the tenant for life. When the mortgage was paid off, trustees were able, because of the low price of trustee investments at that time, to purchase more Consols than they would have done if the conversion had taken place at the end of a year from the testator's death. Lord Lyndhurst held the trustees liable for the excess interest paid to the tenant for life[51] over that which

[39] T.A. 1925, s. 9; *ante*, p. 324.
[40] *Att.-Gen.* v. *Alford* (1855) 4 De G.M. & G. 843; *Fletcher* v. *Green* (1864) 33 Beav. 426 at p. 430.
[41] *Att.-Gen.* v. *Alford*, *supra*, at p. 852.
[42] *Jones* v. *Foxall* (1852) 156 Beav. 388 at p. 393; *Vyse* v. *Foster* (1872) L.R. 8 Ch.App. 309.
[43] Alternatively the beneficiary may have an account of the profits; *Jones* v. *Foxall*, *supra*, at p. 392; *Burdick* v. *Garrick* (1870) L.R. 5 Ch.App. 233; *Re Davis* [1902] 2 Ch. 314; *ante*, p. 398.
[44] *Jones* v. *Foxall*, *supra*, at p. 388 (calling in a mortgage which was returning 5 per cent.); see *Re Waterman's W.T.* [1952] 2 All E.R. 1054.
[45] *Re Jenkins and Randall's Contract* [1903] 2 Ch. 362; *Wright* v. *Morgan* [1926] A.C. 788 at p. 799; *ante*, p. 397.
[46] *Jones* v. *Foxall*, *supra*, at p. 388; *Williams* v. *Powell* (1852) 15 Beav. 461; *Re Barclay* [1899] 1 Ch. 674.
[47] *Re Emmet's Estate* (1881) 17 Ch.D. 142.
[48] *Jones* v. *Foxall*, *supra*, at p. 393; *Burdick* v. *Garrick* (1870) 5 Ch.App. 233.
[49] *Re Emmet's Estate*, *supra*; *Re Barclay*, *supra*.
[50] (1828) 4 Russ. 195.
[51] The tenant for life was entitled only to 4 per cent. under the rule in *Howe* v. *Earl of Dartmouth* (1802) 7 Ves.Jr. 137; Nathan & Marshall, No. 96; *ante*, p. 330.

> would have been payable if the capital of the unauthorised investment had been invested in Consols at the end of a year from the testator's death, and the trustees were unable to set against this the gain arising from the fall in the price of Consols.[52]

The rule is harsh though logical. It has not been applied where the court finds that the gain and loss were part of the same transaction. If that were not so, the liability of trustees purchasing unauthorised securities would automatically be calculated by a reference to the highest price reached by the unauthorised investment while the trustees held it. There is often difficulty in determining whether the question should or should not be regarded as a single transaction.

> In *Fletcher* v. *Green*[53] trust money was lent on mortgage to a firm of which one trustee was a partner. The trustees reclaimed the money; the security was sold at a loss and the proceeds paid into court and invested in Consols. The question was whether the trustees' accounts should credit them with the amount of the proceeds of sale or with the value of the Consols, which had risen in price. They were held entitled to take advantage of the rise. No reasons were given. The case is usually explained on the ground that the whole matter was treated as one transaction. If that is so, they should logically have been at risk in relation to a possible fall in the price of Consols; the trustees can hardly be allowed to take advantage of a rise but not the burden of a fall; but it would be hard on the trustees if they have to run the risk of loss on an investment made by the court.

2. Liability Inter Se: Contribution and Indemnity

A. Joint and Several Liability

Where two or more trustees are liable for a breach of trust, their liability is joint and several. Thus a beneficiary may claim the whole loss by suing all or some or any one of those who are liable; and may levy execution for the whole sum against any one.[54]

B. Liability Inter Se: Contribution

One trustee who has paid more than his share of liability for a breach of trust is entitled to contribution from the other trustees who

52 See also *Wiles* v. *Gresham* (1854) 2 Drew. 258.
53 (1864) 33 Beav. 426.
54 *Fletcher* v. *Green* (1864) 33 Beav. 426 at p. 430.

are also liable [55] or from their estate after death.[56] Each trustee who is liable must contribute equally, regardless of the degree of fault.

> In *Bahin* v. *Hughes*,[57] the Court of Appeal held that a passive trustee was liable equally with the active trustees. Cotton L.J. said [58]: "Miss Hughes was the active trustee and Mr. Edwards did nothing, and in my opinion it would be laying down a wrong rule to hold that where one trustee acts honestly, though erroneously, the other trustee is to be held entitled to indemnity who by doing nothing neglects his duty more than the acting trustee."

C. Indemnity

There are a few cases where one trustee is not liable to contribute; where, that is, he is entitled to an indemnity from his co-trustee against his own liability. Such cases are rare; for such relief "would act as an opiate upon the consciences of the trustees; so that instead of the *cestui que trust* having the benefit of several acting trustees, each trustee would be looking to the other or others for a right of indemnity, and so neglect the performance of his duties." [59] The situations are:

i. Fraud. Where one trustee is fraudulent he alone will be liable.[60] If all are fraudulent the rule used to be that the one who has paid the loss could not claim contribution from the others.[61] It is not clear whether this rule has been affected by Law Reform (Married Women and Tortfeasors) Act 1935.[62]

ii. Solicitor and Trustee. Many of the cases of indemnity are cases where one trustee is a solicitor and has exercised such a controlling influence that the other trustee has been unable to exercise an independent judgment.[63] There is no rule, however, that "a man

[55] *Lingard* v. *Bromley* (1812) 1 Ves. & B. 114; *Fletcher* v. *Green*, *supra*; *Ramskill* v. *Edwards* (1885) 31 Ch.D. 100; *Bahin* v. *Hughes* (1886) 31 Ch.D. 390; Nathan & Marshall, No. 122; *Bacon* v. *Camphausen* (1888) 58 L.T. 851; *Robinson* v. *Harkin* [1896] 2 Ch. 415.

[56] *Jackson* v. *Dickinson* [1903] 1 Ch. 947.

[57] (1886) 31 Ch.D. 390; Nathan & Marshall, No. 122.

[58] *Ibid.* at p. 396.

[59] *Per* Fry L.J. in *Bahin* v. *Hughes*, *supra*, at p. 398.

[60] *Re Smith* [1896] 1 Ch. 171 was an exceptional case of two trustees who acted together, but only one of whom was liable to the beneficiaries for the consequences. One trustee had honestly thought that an investment was a good one, but the other had received a bribe in order to induce him to make it.

[61] *Att.-Gen.* v. *Wilson* (1840) Cr. & Ph. 1 at p. 28.

[62] s. 6. In 64 L.Q.R. 46 at p. 47, P. H. Winfield suggests that the inability to claim is an example of the rule that a plaintiff may not base his claim on his own wrong, and that the rule is unaffected by the Act.

[63] *Re Partington* (1887) 57 L.T. 654; Nathan & Marshall, No. 123.

is bound to indemnify his co-trustee against loss merely because he was a solicitor, when that co-trustee was an active participator in the breach of trust complained of, and is not proved to have participated merely in consequence of the advice and control of the solicitor." [64]

iii. Beneficiary-Trustee.[65] When a beneficiary has participated in a breach of trust with a view to obtaining a personal benefit, he is required to indemnify the trustee; but if he is also a trustee, he would expect a contribution from his co-trustee. The rule in *Chillingworth* v. *Chambers* [66] effects a compromise between these two rules in the case of a person who is both beneficiary and trustee. A beneficiary-trustee must indemnify his co-trustee to the extent of his beneficial interest. That property is taken first to meet the claims; after that, their liability is shared equally. The non-beneficiary trustee is thus given a partial indemnity; partial in that it extends only to the value of the beneficiary-trustee's interest.

3. Punitive Measures

Breach of trust was not, at common law, a crime at all. The trustee was regarded as the owner of the trust property by the common law, which disregarded the rights of the beneficiary. It was therefore no larceny if the trustee converted to his own use property held upon trust. The Court of Chancery had no jurisdiction to punish him. But in 1857 breach of trust was made a statutory crime, and the law on the subject was incorporated in the Larceny Acts 1861 and 1916.

But these Acts have now been repealed and replaced by the Theft Act 1968, which defines "theft" as the dishonest appropriation of property "belonging to another" with the intention of depriving the other of it permanently. By section 5 (2) of the Act, "any person having a right to enforce the trust" is regarded as a person to whom the subject-matter of the trust "belongs," so that the criminal liability of trustees is in this way brought within the general law, and does not require detailed consideration here. The objects of a discretionary trust can presumably be regarded as having a sufficient right of enforcement to bring section 5 (2) into operation for such trusts. Section 4 (2) (*a*) also brings within the definition of "theft" an appropriation by a trustee of "land or anything forming part of it," and section 2 (1) (*c*) makes a trustee guilty of theft if he appropriates property though he believes that the equitable owners cannot be

64 *Head* v. *Gould* [1898] 2 Ch. 250 at p. 265, *per* Kekewich J.; Nathan & Marshall, No. 124; *ante*, p. 294; *Lockhart* v. *Reilly* (1856) 25 L.J.Ch. 697; *Re Turner* [1897] 1 Ch. 536.
65 Nathan & Marshall, pp. 495–496.
66 [1896] 1 Ch. 685.

discovered. The maximum sentence for theft is imprisonment for ten years. A trustee cannot be convicted of theft on any evidence which has first been elicited from him in the course of civil proceedings instituted against him by the person aggrieved, but trustees have no privilege of refusing to incriminate themselves in civil proceedings.[67]

Finally, a trustee who is ordered to pay by a court of equity any sum in his possession or under his control, may be imprisoned in default of payment for a period not exceeding one year.[68]

4. Protection of Trustees

A trustee who has committed a breach of trust may be able to escape personal liability by bringing the case within one of the categories discussed below. Many of the relevant points arose in *Re Pauling's Settlement Trusts*.[69]

> The children of the Pauling family sued to recover from the trustees of their mother's marriage settlement various payments which were alleged to have been made in breach of trust. The Paulings were a united family who were on many occasions in financial difficulties. Their main source of money was Mrs. Pauling's marriage settlement under which she was tenant for life, and the trustees had power, with her consent, to advance up to one-half of the presumptive share of each child in the trust fund. Several advances were made under this power to the children when they had attained ages varying from 27 (in the case of Francis) to 21 (Ann and Anthony). In most cases the advances, although nominally made to the children, were, to the knowledge of everyone concerned, applied for family purposes and usually towards the reduction of Mrs. Pauling's overdraft. On several occasions, but not on all, independent legal advice was obtained. In actions to recover the money from the trustees the defendants relied on the consent and acquiescence of the advanced beneficiaries, and claimed an indemnity under Trustee Act 1925, s. 62, and asked for the benefit of the exercise of the court's discretion under section 61. Several of the payments were held to be in breach of trust and the defences set up by the trustees are considered in the following sections.

A. Participation in, or Consent to, a Breach of Trust

A beneficiary who has participated in, or consented to, a breach of trust may not proceed against the trustees. "It is clear to us,"

[67] Theft Act 1968, s. 31 (1).
[68] Debtors Act 1869, s. 4.
[69] [1964] Ch. 303.

said Willmer L.J. speaking for the Court of Appeal in *Re Pauling's Settlement Trusts*[69] " that if the [trustee] can establish a valid request or consent by the advanced beneficiary to the advance in question, that is a good defence on the part of the [trustee] to the beneficiary's claim, even though it be plain that the advance was made in breach of trust." [70] A reversioner is not " less capable of giving . . . assent when his interest is in reversion than when it is in possession," [71] but he will not be treated as having given consent wherever he fails to take steps to remedy a breach of trust of which he has knowledge.[71]

i. Knowledge. " Consent is not a mere formality. It is a judgment of a person who is interested. . . ." [72] For, if mere knowledge and a passive assent constituted consent, then a trustee could always escape liability by informing a beneficiary of what he proposed to do. The consent must be given by an adult, *sui juris*, in circumstances in which he had a free choice. However, an infant beneficiary may exceptionally be taken to have assented to a breach, for instance, where he fraudulently misstated his age.[73] " The court has to consider all the circumstances in which the concurrence of the *cestui que trust* was given with a view to seeing whether it is fair and equitable that, having given his concurrence, he should afterwards turn round and sue the trustees: . . . subject to this, it is not necessary that he should know that what he is concurring in is a breach of trust, provided that he fully understands what he is concurring in, and that it is not necessary that he should himself have directly benefited by the breach of trust." [74] Thus a beneficiary, who otherwise had a right to set aside a sale, was unable to do so when he had affirmed the sale, accepted part of the purchase money, and caused the purchaser to embark upon further liabilities which he could not repay.[75]

ii. Benefit. It is not necessary that the beneficiary should have been motivated to derive a personal benefit from the breach, nor that he actually received one.[76] Where a beneficiary may recover even though he has received a benefit he must give credit for any benefit which he has received from the breach.[77]

70 *Ibid.* at p. 335.
71 *Life Association of Scotland* v. *Siddal* (1861) 3 De G.F. & J. 58 at p. 73, *per* Turner L.J.
72 *Re Massingberd's Settlement* (1890) 63 L.T. 296 at p. 299.
73 See *Overton* v. *Bannister* (1884) 3 Hare 503.
74 *Per* Wilberforce J. in *Re Pauling's S.T.* [1962] 1 W.L.R. 86 at p. 108, accepted by counsel in the Court of Appeal but not commented on by the Court [1969] Ch. 303 at p. 339; approved in *Holder* v. *Holder* [1968] Ch. 353 at pp. 394, 399, 406.
75 *Holder* v. *Holder*, *supra.*
76 *Fletcher* v. *Collis* [1905] 2 Ch. 24; Nathan & Marshall, No. 119.
77 *Re Pauling's S.T.* [1964] Ch. 303. The £300 received by Ann; and the policies received by Francis and George. See, however, *ibid.* at p. 354 for the reasons

iii. Freedom of Decision. The decision must be freely taken by a person not under disability. Even where the beneficiary is adult and technically under no disability, it may be possible to show that the consent was due to undue influence. Thus, in *Re Pauling*,[78] the advancements were in each case delayed until the child had become 21; but several of the payments which had been made to, or indirectly for, the benefit of the parents were presumed to have been the result of undue influence exercised by them over the children. Indeed it was clear that the advances were all made to meet the financial needs of the father of the family. The Court of Appeal refused to accept the trustees' argument that undue influence was only relevant as between the children and their parents, where the parents had acquired the benefit; they suggested that "a trustee carrying out a transaction in breach of trust may be liable if he knew, or ought to have known, that the beneficiary was acting under the undue influence of another, or may be presumed to have done so, but will not be liable if it cannot be established that he so knew, or ought to have known."[79] It is impossible to say how long after the attainment of majority the presumption continues; this depends upon the circumstances of each case.[80]

B. Release and Acquiescence

These defences relate to the conduct of the beneficiary after the breach has taken place; where they apply, they become equivalent to consent *ex post facto*. A release may be, but need not be, formal; it may be inferred from conduct, as where a beneficiary accepted benefits under his mother's will which prohibited him from setting up any claim in respect of the administration of his father's estate.[81] Length of time in making a claim will not of itself be fatal, but will assist the trustee by requiring less evidence to establish a release.[82] Many of the points raised in connection with consent, apply also here. "I . . . agree that either concurrence in the act, or acquiescence without original concurrence, will release the trustees; but that is only a general rule, and the Court must inquire into the circumstances which induced concurrence or acquiescence."[83] There will be no release for the trustees where the

why Anthony was not required to account for benefits received indirectly through his mother.

78 [1964] Ch. 303.

79 *Ibid.* at p. 338.

80 *Huguenin* v. *Baseley* (1807) 14 Ves.Jr. 273; *Allcard* v. *Skinner* (1887) 36 Ch.D. 145 at p. 171; *Powell* v. *Powell* [1900] 1 Ch. 243 at p. 246.

81 *Egg* v. *Devey* (1847) 10 Beav. 444.

82 *Stackhouse* v. *Barnston* (1805) 10 Ves.Jr. 453; *Life Association of Scotland* v. *Siddal* (1861) 3 De G.F. & J. 58 at p. 77.

83 *Walker* v. *Symonds* (1818) 3 Swans. 1 at p. 64, *per* Lord Eldon; *Stackhouse* v. *Barnston, supra.*

beneficiary acquiesced without knowledge of the facts; but, as with consent, it is not necessary that the beneficiary should have been aware of his legal rights.[84]

C. Impounding the Beneficiary's Interest: Trustee Act 1925, s. 62

i. Inherent Power. Independently of the Trustee Act 1925, s. 62, the court has power to impound the interest of a beneficiary who has instigated or requested a breach of trust.[85] The impounding of the beneficiary's interest means that it will be applied so far as it will go towards providing an indemnity to the trustee in respect of the breach. To obtain this indemnity, the trustee must show that the beneficiary acted with knowledge of the facts, although he may not have known that these amounted to a breach of trust. If the beneficiary instigated or requested the breach, it is not necessary to show that the beneficiary received a benefit[86]; but where a beneficiary merely concurred in or consented to a breach of trust, it seems necessary that a benefit be shown.[87] The trustee, as has been seen, is protected against an action from the consenting beneficiary in respect of the breach.

ii. Trustee Act 1925, s. 62. Section 62 extends this jurisdiction,[88] permitting the court to make an impounding order regardless of any question of benefit. As will be seen, consent, if it is to be effective, must be in writing.[89] Section 62 (1), which applies to breaches of trust committed at any time, reads as follows:

> "Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the court may, if it thinks fit, . . . make such order as to the court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or persons claiming through him."

The effect of an impounding order is not only that the beneficiary is unable to recoup his own losses from the trustee, but also that the liability to make up losses suffered by other beneficiaries will fall on him, rather than on the trustee. The liability cannot,

84 *Holder* v. *Holder* [1968] Ch. 353.
85 Nathan & Marshall, p. 472 *et seq.*
86 *Trafford* v. *Boehm* (1746) 3 Atk. 440; *Fuller* v. *Knight* (1843) 6 Beav. 205; *Chillingworth* v. *Chambers* [1896] 1 Ch. 685 (a trustee beneficiary).
87 *Booth* v. *Booth* (1838) 1 Beav. 125 at p. 130; *Chillingworth* v. *Chambers*, *supra*. It has, however, been said that, even in the case of a beneficiary who requests a breach, the indemnity is limited to the benefit received by the beneficiary: *Raby* v. *Ridehalgh* (1855) 7 De G.M. & G. 104.
88 See Romer J. in *Bolton* v. *Curre* [1895] 1 Ch. 544 at p. 549.
89 The requirement of writing applies only to consent; *per* Lindley M.R. in *Re Somerset* [1894] 1 Ch. 231 at pp. 265–266.

however, be for a greater sum than the subsisting value of his own interest in the trust, and it is subject to the discretion of the court. The discretion is exercised in the light of the earlier cases on which section 62 is founded,[88] and generally speaking an indemnity will be given to a trustee against a beneficiary who has been at all active in inducing a breach. Again, however, the knowledge of the beneficiary must amount to a definite appreciation of what is being done. In *Re Somerset*,[90] an impounding order was refused to trustees who had invested trust funds on a mortgage of a particular property at the instigation of a beneficiary, since the beneficiary had no intention of being a party to a breach and had left it entirely to the trustees to determine how much money to lend on the security.

An impounding order will not be made in respect of a loss sustained by a trustee who, only subsequent to the breach, became entitled to a beneficial interest.[91] The right of indemnity by impounding is, however, available to former trustees after their resignation or replacement. The trustees in *Re Pauling's Settlement Trusts (No. 2)*[92] claimed an indemnity out of the life interest of the parents of the plaintiffs, and Wilberforce J. held that they were entitled to it, and would remain so entitled, although, as was intended, they would at a future time be replaced by new trustees appointed by the court under Trustee Act 1925, s. 41.

D. Statutory Relief: Trustee Act 1925, s. 61

Under this section the court is empowered to excuse trustees from the consequences of a breach of trust. It reads[93]:

> "If it appears to the court that a trustee, . . . is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve him either wholly or partly from personal liability for the same."

The power was first given in 1896 and was considerably attacked[94] on the grounds that trustees ought to go to the court

[90] [1894] 1 Ch. 231; *Mara* v. *Browne* [1895] 2 Ch. 69. *Cf. Raby* v. *Ridehalgh*, *supra*.
[91] *Evans* v. *Benyon* (1887) 37 Ch.D. 329.
[92] [1963] Ch. 576.
[93] *Cf.* also Companies Act 1948, s. 448. The section also applies to executors; T.A. 1925, s. 68 (17).
[94] See Maitland, pp. 99–100 and (1898) 14 L.Q.R. 159 (F. H. Maugham).

for directions in any case in which they felt doubt[95] and that it gave a power to excuse mistakes of law. But it is in the latter type of case that the section can prove indispensable,[96] and the courts have preferred not to lay down formal rules for the application of the section. "It would be impossible," said Byrne J., "to lay down any general rules or principles to be acted on in carrying out the provisions of the section, and I think that each case must depend upon its own circumstances."[97] The only way to show how the discretion has been exercised is to catalogue the cases; but there is inadequate space here.[98] A few general rules, however, can be extracted.

The jurisdiction is available where a trustee "is or may be personally liable" for a breach of trust. There is thus no need to establish the liability; indeed it would put a trustee in a strange position if he had to prove his own liability in order to obtain relief. Several cases allowing relief have done so without reaching a conclusion on the question of liability.[99] However, "'may be' has . . . been interpreted as indicating doubt, not futurity"[1]; the court will not commit itself in advance to giving relief in the case of a future breach of trust.[2]

In exercising the discretion three factors must be considered[3]; the trustee's honesty, reasonableness, and the question whether he ought "fairly" to be excused. There is little authority on "honesty"; dishonest trustees do not apply. But Kekewich J. once characterised as dishonest "a trustee who does nothing, swallows wholesale what is said by his co-trustee, never asks for explanation, and accepts flimsy explanations."[4] If this is right, there must be large numbers of trustees of family trusts who find themselves in that category.

There is some uncertainty as to the standard to be applied in determining reasonableness, but the usual standard is that of a prudent man of business managing his own affairs.[5] The amount of money involved will be a relevant factor.[6] In *Re Stuart*[7]

95 *Perrins* v. *Bellamy* [1899] 1 Ch. 797; Nathan & Marshall, No. 117.
96 *e.g.*, *Re Wightwick's W.T.* [1950] Ch. 260; *ante*, p. 202.
97 *Re Turner* [1897] 1 Ch. 536 at p. 542; *Re Kay* [1897] 2 Ch. 518 at p. 524.
98 See (1955) 19 Conv.(N.S.) 420 at p. 426 (L. A. Sheridan).
99 *e.g.*, *Re Grindey* [1898] 2 Ch. 593.
1 (1955) 19 Conv.(N.S.) 425.
2 *Re Tollemache* [1903] 1 Ch. 457 at pp. 465–466; affirmed at p. 953. The court may, however, authorise an act so as to prevent it being a breach.
3 *Marsden* v. *Regan* [1954] 1 W.L.R. 423 at p. 434.
4 *Re Second East Dulwich, etc., Building Society* (1899) 79 L.T. 726 at p. 727.
5 See Chitty L.J. in *Re Grindey*, *supra*, at p. 601; *Re Turner* [1897] 1 Ch. 536 at p. 542; *Re Lord de Clifford's Estate* [1900] 2 Ch. 707 at p. 716; *Re Stuart* [1897] 2 Ch. 583 at p. 590; Nathan & Marshall, No. 118.
6 *Re Grindey* [1898] 2 Ch. 593; *Marsden* v. *Regan*, *supra*.
7 [1897] 2 Ch. 583.

it was said that, in connection with lending trust money on mortgage, the statutory procedure for valuations and reports [8] "constitute a standard by which reasonable conduct will be judged"; but failure to follow this is "not necessarily a fatal objection to the application of the section."

The distinction between conduct that is reasonable and that for which a trustee ought fairly to be excused is not easy to see. In *Davis* v. *Hutchings* [9] trustees handed property to their solicitor in reliance on his statement that he was the assignee of a share of the fund, but did not disclose that the share was mortgaged. Kekewich J. held that the trustees acted honestly and reasonably, but they should not be excused.[10] Fairness should be considered in relation to all the parties, the trustees, the beneficiaries and the creditors, and is "essentially a matter within the discretion of the judge." [11]

Little seems to be added to this section by the reference to omission to obtain the directions of the court. "I do not see how the trustee can be excused for the breach of trust without being also excused for the omission referred to, or how he can be excused for the omission without also being excused for the breach of trust." [12]

The onus of showing that he acted honestly and reasonably is on the trustee.[13] Applications for relief have most commonly arisen in connection with unauthorised investments.[14] A trustee will not usually be excused if he has "relied on a co-trustee, or on the testator's solicitor, or on some other adviser of the testator's, or on the testator's own course of conduct. . . . The honest taking of what is conceived to be reliable advice will be no ground for excuse if the court believe a prudent man of business would have acted differently in ordering his own affairs." [15] Another and common situation is that of payment of the funds to the wrong beneficiary,[16] or the payment of void claims by creditors,[17] and relief may be

[8] *Re Stuart*, *supra*, at pp. 591–592; *Shaw* v. *Cates* [1909] 1 Ch. 389; Nathan & Marshall, No. 84; *Palmer* v. *Emerson* [1911] 1 Ch. 758.
[9] [1907] 1 Ch. 356.
[10] Some of the dicta of Kekewich J. were disapproved in *Re Allsop* [1914] 1 Ch. 1 at pp. 11, 12; see also *Marsden* v. *Regan* [1954] 1 W.L.R. 423 at pp. 434–435.
[11] *Marsden* v. *Regan*, *supra*, at p. 435.
[12] *Perrins* v. *Bellamy* [1898] 2 Ch. 521 at p. 528; Nathan & Marshall, No. 117.
[13] *Re Stuart* [1897] 2 Ch. 583; Nathan & Marshall, No. 118.
[14] *Re Turner*, *supra*; *Re Stuart*, *supra*; *Re Barker* (1898) 77 L.T. 712; *Re Dive* [1909] 1 Ch. 328.
[15] (1955) 19 Conv.(N.S.) at p. 427.
[16] *Re Allsop* [1914] 1 Ch. 1; *Re Pawson's Settlement* [1917] 1 Ch. 541; *National Trustees Co. of Australasia* v. *General Finance Co. of Australasia* [1905] A.C. 373; *Re Wightwick's W.T.* [1950] Ch. 260.
[17] *Re Lord de Clifford's Estate* [1900] 2 Ch. 707; *Re Mackay* [1911] 1 Ch. 300; *cf. Re Windsor Steam Coal Co. Ltd.* [1929] 1 Ch. 151.

given where the trustee's mistake was one of law.[18] The taking of legal advice is a relevant factor, but does not automatically entitle a trustee to relief.[19]

The section extends to professional trustees who are being paid for their services, but the court is less ready to grant relief in such cases.[20]

E. Limitation and Laches [21]

i. Six-Year Period under Limitation Act 1939, s. 19 (2). Subject to exceptions discussed below, Limitation Act 1939, s. 19 (2), provides a six-year limitation for the protection of trustees. The subsection reads:

> " Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued: Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest fell into possession."

In this subsection, " trustee " includes personal representatives [22] and also certain fiduciary agents,[23] company directors [24] and a mortgagee in respect of the proceeds of sale,[25] but not a trustee in bankruptcy,[26] nor the liquidator of a company in voluntary liquidation.[27] It will also be noted that there is no distinction between the protection given to an express trustee and that given to an implied or constructive trustee; until Trustee Act 1888, s. 8, no protection based upon passage of time had been available to an express trustee.[28] It will be seen that the subsection only applies to cases where an action is brought by a beneficiary in respect of the trust

18 *Holland* v. *German Property Administrator* [1937] 2 All E.R. 807.
19 *National Trustees Co. of Australasia* v. *General Finance Co. of Australasia* [1905] A.C. 373; *Marsden* v. *Regan* [1954] 1 W.L.R. 423 at pp. 434–435.
20 *National Trustees Co. of Australasia* v. *General Finance Co. of Australasia* [1905] A.C. 373; *Re Windsor Steam Coal Co.* [1929] 1 Ch. 151; *Re Waterman's W.T.* [1952] 2 All E.R. 1054; *Re Pauling's S.T.* [1964] Ch. 303 at pp. 356–359; *ante*, p. 294.
21 See Preston & Newsom, Chap. 5; Franks, *Limitation of Actions*, pp. 62–80.
22 Limitation Act 1939, s. 31 (1); T.A. 1925, s. 68 (17).
23 *Burdick* v. *Garrick* (1870) L.R. 5 Ch.App. 233.
24 *Re Lands Allotment Co.* [1894] 1 Ch. 616.
25 *Thorne* v. *Heard* [1895] A.C. 495.
26 *Re Cornish* [1896] 1 Q.B. 99.
27 *Re Windsor Steam Coal Co.* [1928] Ch. 609; affirmed on other grounds [1929] 1 Ch. 151.
28 Nathan & Marshall, pp. 481–484; Franks, *loc. cit.*, p. 64.

property.[29] Under the proviso, time only begins to run against remaindermen or reversioners when their interest falls into possession; and it has been held that this does not occur when improper advancements are made in favour of remaindermen.[30] And if a beneficiary is entitled to two interests in the property, one in possession and one in remainder, he does not lose a claim in respect of the latter where time has run against him in respect of the former.[31]

ii. Exceptions to the Six-Year Rule. There are some exceptions to the six-year rule.

(a) *Limitation Act 1939, s. 19 (1).*

"(1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action—

(*a*) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(*b*) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use."

This subsection reproduces in the cases to which it applies the rule of permanent liability which was applicable in equity to the case of express trustees.

In *North American Land Co.* v. *Watkins*,[32] an agent had been sent to America to buy land for his company. He bought it, and it was duly conveyed to the company, but the agent made and retained a profit for himself. After the expiration of the period applicable for the recovery of money had and received, the company successfully recovered the money on two grounds, first that the agent was in the position of a trustee and had retained trust money, and secondly that his conduct had been fraudulent.

It seems that the fraud must be that of the trustee himself.

In *Thorne* v. *Heard* [33] a trustee was protected where he had negligently left funds in the hands of a solicitor who had embezzled them; for the trustee to come within section 19 (1) he must be "party or privy" to the fraud.

[29] *Re Bowden* (1890) 45 Ch.D. 444 at p. 451.
[30] *Re Pauling's S.T.* [1964] Ch. 303.
[31] *Mara* v. *Browne* [1895] 2 Ch. 69, reversed on another point [1896] 1 Ch. 199.
[32] [1904] 1 Ch. 242; [1904] 2 Ch. 233.
[33] [1894] 1 Ch. 599; [1895] A.C. 495; *Petre* v. *Petre* (1853) 1 Drew. 371; *Re Fountaine* [1909] 2 Ch. 382.

No question of dishonesty arises where a trustee is in possession of the trust property.

> In *Re Sharp*[34] trustees had paid to themselves annuities to which they were entitled, but had done so without deduction of tax and they were held to lose their protection within the provisions of the subsection in respect of the amount which should have been deducted for income tax.
>
> And in *Re Howlett*[35] a life tenant, whose interest terminated on remarriage, continued in possession of a wharf until he died, and the remainderman was held able to sue the life tenant's representatives after his death for an occupation rent for the premises.

Conversion to the trustee's own use requires some wrongful application in his own favour. A trustee was held to escape from the subsection where he applied the trust funds for the maintenance of an infant beneficiary,[36] or where trust funds advanced on mortgage were, with the concurrence of the mortgagor, used to pay a debt previously charged on the mortgaged property in favour of a bank of which a trustee was a partner,[37] or where the funds were dissipated by a co-trustee.[38]

(b) *Claim to the Personal Estate of a Deceased Person.* Under section 20, which is subject to section 19 (1), an action in respect of any claim to the personal estate of a deceased person must be brought within the period of twelve years. Difficult questions on the inter-relation of this section and section 19 (2) can arise where the personal representatives administering an estate would normally be treated as having become trustees. In that case the question is whether the twelve-year or six-year rule is applicable.[39] The better view, it is submitted, is that the twelve-year rule applies even though the personal representatives would for other purposes be treated as having become trustees.[40]

(c) *Sections* 22 *and* 26. Section 22 allows an extension of the period of limitation in cases in which the plaintiff has been under disability. Section 26 provides that where any action is based upon

34 [1906] 1 Ch. 793.
35 [1949] Ch. 767; *Wassell* v. *Leggatt* [1896] 1 Ch. 554; *Re Eyre-Williams* [1923] 2 Ch. 533; *Re Clark* (1920) 150 L.T.Jour. 94; see also *Re Landi* [1939] Ch. 828; *Re Milking Pail Farm Trusts* [1940] Ch. 996.
36 *Re Page* [1893] 1 Ch. 304; *Re Timmis* [1902] 1 Ch. 176.
37 *Re Gurney* [1893] 1 Ch. 590.
38 *Re Tufnell* (1902) 18 T.L.R. 705; *Re Fountaine* [1909] 2 Ch. 382.
39 *Re Timmis* [1902] 2 Ch. 176; *Re Richardson* [1920] 1 Ch. 423; *Re Oliver* [1927] 2 Ch. 323; *Re Diplock* [1948] Ch. 465; [1951] A.C. 251; Tiley, p. 349.
40 See Pettit, 323–324, for a discussion of the point; Franks, *Limitation of Actions*, pp. 49–50; Preston and Newsom, 188.

fraud or where the right of action is concealed by fraud or where the action is for relief from the consequences of a mistake, "the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake . . . or could with reasonable diligence have discovered it." This section applies to actions against trustees.[41]

iii. Assignees. A transferee from the trustee is in the same position as the trustee was[42]; unless he is bona fide purchaser for value without notice in which case he will presumably be treated as if he had purchased from someone who was not a trustee.

iv. Where No Period is Applicable. It has been seen that the Limitation Act 1939 deals comprehensively with the running of time in actions against trustees. In situations not covered, it is necessary to return to the law as it existed before the statutory protection was given. No provision is made, for example, either for claims for equitable relief by way of specific performance, rescission or rectification, or injunction[43]; or in cases of redemption of a mortgage of pure personalty,[44] or of foreclosure of an advowson,[45] or the setting aside of a purchase of trust property by a trustee.[46] The rule of equity is that either no period is applicable, or that the relevant common law period is applied by analogy. In any situation for which no period of limitation is expressly applicable to an equitable claim, the defendant may rely on the doctrine of laches.[47] Delay by a plaintiff in pursuing his rights "may furnish a defence in equity to an equitable claim."[48] Whether such a defence is available in a particular case is a matter for the discretion of the court, and will depend to a large extent upon the hardship caused to the plaintiff by the delay, and the effect upon third parties; and generally upon the balance of justice in granting or refusing relief.[49] There is no maximum period beyond which the equitable relief cannot be sought but a period of twenty years may be taken as a

[41] See *Beaman* v. *A.R.T.S.* [1949] 1 K.B. 550; *Kitchen* v. *R.A.F. Association* [1958] 1 W.L.R. 563; *Phillips-Higgins* v. *Harper* [1954] 1 Q.B. 411; Tiley, p. 150.

[42] See *Re Dixon* [1900] 2 Ch. 561; *Re Eyre-Williams* [1923] 2 Ch. 533; *Baker* v. *Medway Building and Supplies Ltd.* [1958] 1 W.L.R. 1216; *Eddis* v. *Chichester-Constable* [1969] 3 W.L.R. 48.

[43] See Limitation Act 1939, s. 2 (7).

[44] *Weld* v. *Petre* [1929] 1 Ch. 33; Tiley, p. 152.

[45] *Brooks* v. *Mucklestone* [1909] 2 Ch. 519.

[46] *Baker* v. *Read* (1854) 18 Beav. 398; *Morse* v. *Royal* (1806) 12 Ves.Jr. 355; Nathan & Marshall, No. 88; Snell, p. 40.

[47] *Re Pauling's S.T.* [1964] Ch. 303.

[48] *Re Sharpe* [1892] 1 Ch. 154 at p. 168; *Smith* v. *Clay* (1767) 3 Bro.C.C. 639n.; Franks, *loc. cit.*, p. 233 *et seq.*; Brunyate, *Limitation of Actions in Equity.*

[49] *Lindsay Petroleum Co.* v. *Hurd* (1874) L.R. 5 P.C. 221 at pp. 239–241; *Weld* v. *Petre* [1929] 1 Ch. 33 at pp. 51, 52.

convenient guide.[50] The defendant will be more likely to succeed if he can show not merely delay, but acquiescence. Both defences appear to have been retained by the Limitation Act 1939 which provides in section 29 "nothing in the Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise."

These defences are therefore relevant to cases to which no period is applicable, including those within section 19 (1). Prior to 1940 the doctrine of laches applied differently in regard to express and other trustees; but it seems that there should no longer be a distinction,[51] and that the position of express trustees alone need be considered. The rule "seems to be that while the doctrine of laches applies to claims by beneficiaries, relief will only be refused in plain cases."[52]

5. Proprietary Remedies

A. Personal and Proprietary Actions

Most actions at law and in equity are personal. We now have to consider the occasions on which a plaintiff has the right to proceed against a particular asset in the defendant's hands. Such proprietary remedies exist to a very limited extent at law; and these, for convenience and for the sake of comparison, will be described here.[53] In equity the right to follow or trace property is more extensive. We will see that a proprietary remedy may be available where the plaintiff is making a claim at law or in equity to a specific piece of property, and also where he is making a claim in equity against a mixed fund to which property of his (in equity) has contributed.

There are several advantages of a proprietary over a personal remedy. First and foremost, satisfaction of the plaintiff's demand does not depend on the solvency of the defendant. If the property traced is the plaintiff's in equity, it escapes the defendant's bankruptcy.[54] Secondly, in some cases, the plaintiff will be able to take advantage of increases in the value of the property. This is obvious where specific property is treated as being the plaintiff's in equity. The position is more doubtful where a mixed fund is in question. Thirdly, a plaintiff may obtain an order under R.S.C., Order 50, r. 3, for the preservation of the property pending the hearing of the action.[55] Further, there appear to be some cases in which the proprietary remedy is available although no personal action will lie.[56]

50 *Weld* v. *Petre*, *supra*, at pp. 54, 55.
51 Franks, *loc. cit.*, p. 260; *cf. Re Jarvis* [1958] 1 W.L.R. 815; Tiley, p. 154.
52 Franks, *loc. cit.*, p. 261.
53 *Post*, p. 416.
54 Bankruptcy Act 1914, s. 38 (1); Halsbury, Vol. 2, p. 435.
55 The attempt failed in *Lister* v. *Stubbs* (1890) 45 Ch.D. 6; *post*, p. 424.
56 *Sinclair* v. *Brougham* [1914] A.C. 398.

And, finally, judgment in a proprietary action carries interest from the date on which the property came to the defendant's hands, while claims *in personam* carry interest only from the date of judgment.[57]

B. Unjust Enrichment. Restitution [58]

Proprietary remedies cannot be fully understood without some appreciation of the doctrine of unjust enrichment. This is a doctrine which appears in nearly every system of law. It lays down as a general principle that where the defendant is unjustly enriched at the plaintiff's expense, the defendant must make restitution to the plaintiff.[59] Such a principle has its greatest scope in the area of quasi-contract, but it overlaps also into contract, tort, and into many areas of equity.

The development of unjust enrichment in England had been bogged down by the dispute on the question whether or not a quasi-contractual action is theoretically based upon an implied contract.[60] In 1951, Lord Porter said [61]: "My Lords, the exact status of the law of unjust enrichment is not yet assured. It holds a predominant place in the law of Scotland and, I think, of the United States, but I am content for the purposes of this case to accept the view that it forms no part of the law of England. . . ." Even though there is no such right to restitution in every case of unjust enrichment, all restitutionary claims are unified by the principle.[62] Ultimately, the search is to do justice between the parties.

Assume that A has a right to sue B on the ground that A has paid money to B by mistake, or under compulsion, or under a sudden emergency, or under a contract that was void, or in breach of trust, or in any other situation in which B is enriched at the expense of A. If B is solvent, a personal action will satisfy A's claim. What should be the effect on this situation if, (a) B is bankrupt, or (b) B invests the money and it doubles in value? In case (a) it is arguable that since B should never have had the money, nor should his creditors. The creditors run the risk of B's insolvency, and

[57] *Re Diplock* [1948] Ch. 465.

[58] Goff & Jones, *Restatement of Restitution.*

[59] *Restatement of Restitution*, para. 1.

[60] (1924) 40 L.Q.R. 34–36 (H. G. Hanbury); (1938) 54 L.Q.R. 201 (C. K. Allen); (1938) 6 C.L.J. 305; *Legal Essays and Addresses*, Chap. 1 (Lord Wright); (1939) 55 L.Q.R. 37 (W. S. Holdsworth); R. M. Jackson, *History of Quasi-Contract*, pp. 117–124; Winfield, *Province of the Law of Tort*, pp. 124–141, *The Law of Quasi-Contract*, pp. 14–21; Stoljar, *The Law of Quasi-Contract*, pp. 2–9; *Sinclair* v. *Brougham* [1914] A.C. 398; *United Australia Ltd.* v. *Barclays Bank* [1941] A.C. 1; Goff & Jones, p. 5.

[61] *Reading* v. *Att.-Gen.* [1951] A.C. 507 at pp. 513–514.

[62] Goff & Jones, p. 13.

there is no reason why they should have the advantage of a payment into B's estate out of money of A's which B should never have had. A did not rely on B's solvency, and should have a prior claim to the available money. In case (b) it can be argued that neither B nor his creditors should reap the full measure of the profit which B has made out of money which he should never have had. Should A have it? Would it make any difference if the invested funds were part A's and part B's? We might here pose a further case (c). If B uses the money (*i.e.*, A's) to pay off a mortgage on his property and is insolvent, should A be placed in the position, by subrogation, of the mortgagee? These are all interesting and difficult questions, to some of which the English cases provide answers; to others not. The cases have proceeded pragmatically from one point to another without keeping the various problems and principles in mind; and a number of unnecessary difficulties arise for this reason.

C. Tracing at Common Law

A proprietary remedy is one which entitles a claimant to treat specific property, or a portion thereof, as his own. If the common law had developed a real action for chattels which entitled a plaintiff to specific recovery, the claimant would be able to demand the return of the chattel. But although the court recognised the plaintiff as being the owner, there was no such action at common law. The defendant had the choice of paying damages or returning the chattel. A discretion to award specific recovery was given to the court in 1854.[63]

The plaintiff's ownership was relevant however in that his entitlement was to the chattel or to its value—its full value that is, even if the defendant is insolvent, and not merely to a dividend in the insolvency. In the case of a loan, the plaintiff's claim for the money lent to an insolvent defendant would abate; it was something owed. The position is different with the chattel; that was something owned.

The question then arises whether this right of the plaintiff is limited to the case of a specific chattel. Should his right not continue if the defendant had exchanged one chattel for another; or the chattel for a sum of money; or had spent that money on another chattel? The answer of the common law is that of Lord Ellenborough in *Taylor* v. *Plumer*[64]: "It makes no difference in reason or law into what other form, different from the original, the change may have been made, whether it be into that of promissory notes

[63] Common Law Procedure Act 1854, s. 78.
[64] (1815) 3 M. & S. 562 at p. 575.

for the security of the money which was produced by the sale of the goods of the principal, as in *Scott* v. *Surman*,[65] or into merchandize, as in *Whitecomb* v. *Jacob*,[66] for the product of, or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of fact and not of law, and the dictum that money has no ear-mark must be understood in the same way; *i.e.*, as predicated only of an undivided and undistinguishable mass of current money. But money in a bag or otherwise kept apart from other money, guineas, or other coin, marked, if the fact were so, for the purpose of being distinguished, and so far ear-marked as to fall within the rule on this subject, which applies to every other description of personal property whilst it remains (as the property in question did) in the hands of the factor [the bankrupt] or his general legal representatives."

> In *Taylor* v. *Plumer*,[67] the defendant handed money to a stockbroker, Walsh, to purchase exchequer bonds. Walsh instead purchased American investments and bullion and hurried off to Falmouth to board a packet for America. He was apprehended, and the investments and bullion were seized. On his bankruptcy, his assignees sought to recover them from the defendant. They failed. The investments were the ascertainable product of the defendant's money and owned by the defendant. If the parties had been reversed, and Sir Thomas Plumer had been suing for the recovery of the securities and bullion, his action would have succeeded, but the assignees would have had the choice of returning them or of paying their full value in damages; just as if Walsh had taken the defendant's coach and horses and had had them in his possession on his bankruptcy.

It should be noted that this question is an entirely different one from that discussed by M. Scott in his article on tracing at common law.[68] He is concerned with situations in which a common law action, such as conversion, detinue, or for money had and received, will lie by reason of the property of the plaintiff being identifiable in, or having passed through, the hands of the defen-

[65] (1742) Willes 400.
[66] (1710) Salk. 160.
[67] (1815) 3 M. & S. 562.
[68] (1966) 7 W.A.L.R. 463.

dant. In its simplest form, if my chattel or money is stolen in succession by A, B, C and D, I can sue each of them in conversion. Mr. Scott does not deal with our present question, that of the availability of a proprietary remedy, such as will give, if not specific recovery, a prior claim in an insolvency. ". . . there is no action at law which gives a remedy *in rem* for the recovery of money or other property. There is nothing at common law to correspond with the equitable tracing order. To 'trace' at common law means no more than to identify property, in a changed form and in new hands, in order to found a personal action in support of a proprietary right." [69] In this he does the common law less than justice. Sir Thomas Plumer could have had a prior claim in the bankruptcy if he had been plaintiff. As was said in *Scott* v. *Surman*,[70] dealing with a claim against a factor for money due on two notes received by him and unpaid at the time of his bankruptcy: "The assignees having received this money which belongs to the plaintiffs and ought not to be applied to pay the bankrupt's debts, they ought to have paid it to the plaintiffs, and not having done so, this action will lie against them for so much money had and received to the use of the plaintiffs." This is an example then of a successful claim in an action for money had and received for the full value of the notes in a bankruptcy; the money was identifiable as belonging to the plaintiff.

Any such right is lost at law if the money becomes part of a mixed account because it is no longer identifiable. Mere payment into a bank account does not apparently preclude identification [71]; but if the bankrupt's money is mixed with the plaintiff's, it is no longer possible to identify anything that the plaintiff *owns* at law; the means of ascertainment fail. Equity, as we will see, overcame this problem. For this reason the common law remedies rarely appear; problems of tracing in real life arise almost exclusively in cases where the plaintiff is seeking money in a mixed account. This means, as we will see, that in practice the tracing remedy is limited to cases where there is a breach of a fiduciary relation which makes the equitable remedy available. The solution, recommended below, is not a building up of the legal remedy, but of the abolition of the restriction of the equitable to cases where there is a fiduciary relation.

D. Tracing in Equity

i. Unmixed Funds. Equity has developed more sophisticated methods of tracing. The easy case is that in which there has been

[69] (1966) 7 W.A.L.R. 463 at p. 489.
[70] (1742) Willes 400 at p. 405.
[71] *Banque Belge* v. *Hambrouck* [1921] 1 K.B. 321.

no mixing of the trust funds with the trustee's own money. If the trustee has sold the trust property, rightly or wrongly, the beneficiary may take the proceeds if he can identify them. And if the proceeds of sale have been used to purchase other property the beneficiary may "follow" them and may "elect either to take the property purchased, or to hold it as a security for the amount of trust money laid out in the purchase; or, as we generally express it, he is entitled at his election either to take the property, or to have a charge on the property for the amount of the trust money." [72] Claims in equity will never, of course, be valid against a bona fide purchaser for value.[73]

ii. Mixed Funds. The position is more complicated where the trustee has mixed the trust funds with his own. Or if, after the mixing, there should have been further dealings with the fund; for there is then the problem of the identification of the trust funds in the mixed account or in other property into which it has been converted.

(a) *Identification.* The onus is on the trustee to prove initially that part of the mixed fund is his own. ". . . if a trustee amalgamated [trust property] with his own, his beneficiary will be entitled to every portion of the blended property which the trustee cannot prove to be his own." [74]

If the composition of the mixed fund is able to be established at the time of the original mixing, the problem of identification is one of determining how to account for reductions in the fund by payments out and for increases in the fund by payments in.

> In *Re Hallett's Estate*,[75] Hallett, a solicitor, died after having mixed with his own money certain funds from two trusts, one his own marriage settlement of which he was trustee, and the other a trust of which a client, Mrs. Cotterill, was beneficiary. At his death there were insufficient funds to pay his personal debts and to meet these claims.
>
> Three questions arose; (i) whether Mrs. Cotterill, not being a beneficiary of a trust of which Hallett was a trustee, was entitled to the tracing remedy on the ground of the fiduciary relationship; (ii) (assuming that she was) how to allocate the payments from the fund as between Hallett and the claimants; and (iii) as between the claimants themselves.

[72] *Per* Jessel M.R. in *Re Hallett's Estate* (1880) 13 Ch.D. 696 at p. 709; Nathan & Marshall, No. 80.

[73] *Thorndike* v. *Hunt* (1859) 3 De G. & J. 563; *Taylor* v. *Blakelock* (1886) 32 Ch.D. 560; *Thomson* v. *Clydesdale Bank* [1893] A.C. 282; *Coleman* v. *Bucks and Oxon Union Bank* [1897] 2 Ch. 243.

[74] *Lewin on Trusts* (16th ed.) 223, quoted by Ungoed-Thomas J. in *Re Tilley's W.T.* [1967] Ch. 1179 at p. 1182; *Lupton* v. *White* (1808) 15 Ves.Jr. 432.

[75] (1880) 13 Ch.D. 696.

> The Court of Appeal held that Mrs. Cotterill was entitled to trace, and that the payments out must be treated as payments of Hallett's own money. This left sufficient to satisfy the claims of Mrs. Cotterill and of the beneficiaries under the marriage settlement, so the third question did not arise.[76]

We are at present concerned with (ii). The other matters will be discussed later.[77] The reason given by Jessel M.R. for allocating payments to Hallett's money and not to the trust is that wherever an act "can be done rightfully, [a man] is not allowed to say, against the person entitled to the property or the right, that he has done it wrongfully."[78] This rule proved to be too precise; it would reach the wrong result if the earlier payment out was in favour of an unauthorised investment which prospered, and the remainder of the fund was dissipated.[79] The correct rule appears to be that the beneficiary may claim a charge upon any part of the fund which he can identify as having been part of the mixed fund.[80]

(b) *Lowest Intermediate Balance.* It has been said that the tracing remedy usually becomes relevant when the defendant is insolvent; where therefore it becomes crucial to determine whether the beneficiary claiming to trace should be given a prior claim over the other creditors. This factor must always be borne in mind when considering whether, theoretically, the tracing remedy ought to be available. The question is essentially one of competition between the beneficiary and the creditors. It is arguable that the tracing remedy in *Re Hallett*[81] is unfair to the creditors. They suffer when the defendant trustee pays money out of a mixed fund, for this, as we have seen, is treated as the payment of the trustee's own money. On the other hand, the part of the fund which consists of trust money is money which the trustee should never have had in his own account. We could go to the other extreme and say that, as the trustee's duty is to perform the trust, the whole of his property should be available for that purpose; and that any money he earns or receives after the mixing should be applied towards the remedying of the breach.[82] This however would be very harsh on the creditors; a creditor lends money or otherwise gives credit to the defendant on

[76] In the court below, where, on the view taken by Fry J., the third question did arise, it was solved by applying the rule in *Clayton's Case* (1817) 1 Mer. 572.
[77] *Post*, p. 421.
[78] (1880) 13 Ch.D. at p. 727.
[79] *Re Oatway* [1903] 2 Ch. 356; Scott, *Law of Trusts* (3rd ed.), para. 517:1; *Re Tilley's W.T.* [1967] Ch. 1179 at p. 1185.
[80] *City of Lincoln* v. *Morrison,* 64 Neb. 822; 90 N.W. 905 (1902).
[81] (1880) 13 Ch.D. 696.
[82] *Hungerford* v. *Curtis*, 43 R.I. 124; 110 A. 650 (1920); *Myers* v. *Matusek*, 98 Fla. 1126, 125 S. 360 (1929); 30 Mich.L.R. 441; Dawson and Palmer, *Cases on Restitution*, p. 94 at p. 95.

the basis of his estimate of the defendant's financial stability. It would be harsh to apply all the trustee's money in the first place to the satisfaction of the beneficiaries' claims. The rule is that the tracing remedy can be applied against a mixed fund to the extent that the trust funds can still be shown to be there. If the account falls below that sum, that part of the trust money must have been spent.[83] Later payments in are not treated as repayments of the trust fund unless the trustee shows an intention to do so.[84] It is essential therefore to ascertain from the accounts the lowest intermediate balance in the fund; to that extent the tracing remedy is available.

(c) *Rule in Clayton's Case.*[85] Another possible method of allocating payments in and out of a mixed fund would be to apply the rule in *Clayton's* case,[85] which lays down that in the case of an active continuing bank account, the first payment in is appropriated to the earliest debt which is not statute-barred; in other words, first in, first out. This is a rule which has some relevance and convenience in commercial matters. We have seen that it does not apply to accounts between trustee and beneficiary. Nor, it is submitted, should it appear in any aspect of the present subject[86]; but it has unfortunately been applied as a means of determining entitlement in a mixed banking account between rival persons with a right to trace,[87] and also between a person with a right to trace and an innocent volunteer.[88] It never appears in any context other than that of a continuing or current bank account.[89]

iii. Who is Entitled to Trace. We have so far spoken of tracing between trustee and beneficiary. *Re Hallett*[87] decided that the remedy was not restricted to such a case but was available between fiduciaries. "Has it ever been suggested," said Jessel M.R.,[90] "until very recently, that there is any distinction between an express trustee or an agent, or a bailee, or a collector of rents, or anybody else in a

[83] In *Roscoe* v. *Winder* [1915] 1 Ch. 62 at p. 69 Sargant J. said that the tracing remedy applied to "such an amount of the balance ultimately standing to the credit of the trustee as did not exceed the lowest balance of the account during the intervening period."

[84] *Roscoe* v. *Winder*, *supra*.

[85] (1817) 1 Mer. 572; (1963) 79 L.Q.R. 388 (D. A. McConville); (1965) 6 W.A.L.R. 428 at p. 437 (P. F. P. Higgins).

[86] (1963) 79 L.Q.R. 401–402 (D. A. McConville).

[87] *Re Hallett's Estate* (1879) 13 Ch.D. 696 (Fry J.); Nathan & Marshall, No. 80; *Hancock* v. *Smith* (1889) 41 Ch.D. 456; *Re Stenning* [1895] 2 Ch. 433; *Re Diplock* [1948] Ch. 465; Tiley, p. 349 (in the case of the National Institute for the Deaf).

[88] *Re Stenning* [1895] 2 Ch. 433; *Mutton* v. *Peat* [1899] 2 Ch. 556 at p. 560 *per* Byrne J.; *Re Diplock*, *supra*.

[89] *Sinclair* v. *Brougham* [1914] A.C. 398; *Re Diplock* [1948] Ch. 465 at p. 554 (The Royal Sailors Orphan Girls School and Home (Action 111C)).

[90] (1880) 13 Ch.D. 696 at p. 709.

fiduciary position? "[91] Nor is it necessary that the fiduciary relation should exist between the parties to the action.

> In *Sinclair* v. *Brougham*[92] the Birkbeck Building Society operated a banking business which was held to be *ultra vires*. In the winding up of the Society, competition arose between the claims of the shareholders and of the bank customers (called the depositors). One of the questions that fell to be decided was whether the depositors had the right to trace into the general assets of the Society. The House of Lords held (as explained in *Re Diplock*[93]) that there was a fiduciary relation between the depositors and the directors; the directors had mixed the funds and the depositors had the right to trace them into the hands of the Society, recognising an equal claim of the shareholders with whom they shared *pari passu*.[94]

The matter was taken a step further in *Re Diplock*[95]; for the mixing was there done, not by the fiduciary agent, but by the innocent volunteer (the charities) to whom the agent handed the money.

> By his will Caleb Diplock gave the residue of his property on trust "for such charitable institutions or other charitable or benevolent . . . objects in England as my . . . executors . . . may in their . . . absolute discretion select." He and the executors thought that this was a valid charitable gift, but a reference to Chapter 15 will show that this is not so.[96] The executors distributed £203,000 among a considerable number of charitable institutions; and when the invalidity of the charitable gift was discovered, the next-of-kin claimed to recover the money from the charities. They succeeded in a personal claim[97]; and were also entitled to the tracing remedy, the Court of Appeal laying down as the test that[98] "equity may operate on the conscience

[91] See Goff & Jones, p. 41, where they point out how difficult it is to define precisely who is a fiduciary. They suggest that a "useful pragmatic yardstick" is the test applicable to decisions on the applicability of the Statutes of Limitation, namely, "whether the agent is under a duty to keep separate his own money from his principals' money."

[92] [1914] A.C. 398.

[93] [1948] Ch. 465 at p. 532.

[94] The validity of the explanation is doubted by Goff and Jones, p. 42. "But the depositors' money never passed through the hands of the directors and, in any event, since it is only in rare circumstances that directors are in a fiduciary relationship even with their shareholders, it is not easy to see how they could have been in any such relationship with depositors who had made an *ultra vires* deposit of money with the Society."

[95] [1948] Ch. 465.

[96] *Ante*, p. 275; *Chichester Diocesan Fund* v. *Simpson* [1944] A.C. 341.

[97] [1951] A.C. 251. The appeal to the House of Lords concerned only the claim *in personam*.

[98] [1948] Ch. 465 at p. 530; *cf. Commissioner of Stamp Duties* v. *Livingston* [1965] A.C. 694; *ante*, p. 93.

not merely of those who acquire a legal title in breach of some trust, express or constructive, or of some other fiduciary obligation, but of volunteers provided that as a result of what has gone before some equitable proprietary interest has been created and attaches to the property in the hands of the volunteer." The "equitable proprietary interest" was established by the equitable claim by the plaintiffs as next-of-kin against the executors; and this gave the plaintiffs the right to trace against the charities.

iv. Two Criticisms of the Rule Laying Down the Right to Trace. In the days before the fusion of the jurisdictions of law and equity, it was only possible to obtain equitable remedies if the litigation were "in equity." It is not therefore surprising that the test which has been laid down historically for the availability of the equitable tracing remedy is that the plaintiff should be entitled to an equitable proprietary interest. But a legal and beneficial owner is just as much owner in equity as is a beneficiary under a trust, and equity never disputed this. It merely did not have jurisdiction to adjudicate on it.

(a) *The Requirement that the Proprietary Interest should be Equitable.* There seems to be no reason at all on the merits why the equitable tracing remedy should not be available also to the beneficial legal owner. Indeed, it was arguable, before *Re Diplock*[99] was decided, that this situation had been reached by the combined effect of *Sinclair* v. *Brougham*[1] and *Banque Belge* v. *Hambrouck*.[2] Atkin L.J. treated the equitable tracing remedy as a means of overcoming the common law's difficulty in identifying the plaintiff's money in a mixed fund[3]: "The question always was, Had the means of ascertainment failed? But if in 1815 the common law halted outside the bankers' door, by 1879 equity had had the courage to lift the latch, walk in and examine the books: *Re Hallett's Estate*.[4] I see no reason why the means of ascertainment so provided should not now be available both for common law and equity proceedings." It is doubtful, however, since *Re Diplock*,[99] whether the equitable tracing remedy will be available in the absence of a fiduciary relation.

Consider two cases; B owes £1,000 to his creditors and has only £100. He steals £1,000 from A and mixes that money in his account which now has £1,100. He now "owes" £2,000. Should the available money be shared equally between A and the creditors, each getting 11s. in the pound? Or should A get back first his £1,000, which B should never have had? There is no such remedy available to A on

[99] [1948] Ch. 465.
[1] [1914] A.C. 398.
[2] [1921] 1 K.B. 321.
[3] *Ibid.* at p. 335.
[4] (1880) 13 Ch.D. 696.

the authorities. Common law tracing is not available because the funds are mixed; nor equitable tracing because there is not a fiduciary relation between a thief and his victim.

Again, let B hold A's money as a fiduciary agent. B passes the money to C, who mixes it with money of his own. A can trace into C's hands. If C passes it to D, A can trace against D. But if A and B were the same person, if A had legal ownership as well as equitable, his rights would be taken away.

It is submitted that if proprietary remedies are to be based on ownership of property they should protect beneficial ownership in the full sense, and not only ownership behind a trust.

(b) *The Requirement of a Proprietary Interest.* It is questionable, however, whether the tracing remedy should be limited to cases of proprietary interests. It appears from the statement of the rule above quoted that there is no requirement of proprietary interest in the case of a claim to trace against a fiduciary; why should it be a requirement when the property is being followed into other property or into the hands of someone other than the fiduciary agent?

> In *Lister* v. *Stubbs*,[5] the defendant as purchasing agent for the plaintiffs had taken secret commissions from a firm from whom the plaintiffs obtained supplies. Part of the money was still in cash, but a large part had been invested in the purchase of land. There was no difficulty in recovering the money, but the plaintiffs moved also for an injunction to restrain Stubbs from dealing with the land, and for an order directing him to bring the investments or cash into court. The Court of Appeal held that, while the plaintiffs had a right to recover the money, they had no right to follow the money into the investments; for the money had never been their money; it was merely money owed to them by the defendant.

It is submitted that the plaintiffs should have been able to follow the money into the investments. There seems to be no reason why the property, which Stubbs should never have had, needs to be kept for his creditors; nor any reason why Stubbs should be able to enjoy the profit he may make from his investment. The breach of a fiduciary obligation should be sufficient to make available the tracing remedy; indeed the remedy should, as submitted above, be wider than this, and it seems quite consistent with principle to make the tracing remedy available whenever the defendant is unjustly enriched at the plaintiff's expense.[6]

[5] (1890) 45 Ch.D. 1.
[6] *Restatement of Restitution*, para. 160; *ante*, p. 236.

v. The Remedies Available. We saw that Jessel M.R. said in *Re Hallett's Estate*[7] that where trust funds, unmixed, could be traced, the claimant could choose to take the property purchased with them, or to have a charge upon it for the amount; but that if property had been mixed with the trustee's own, and property purchased with the mixed fund, the claimant's remedy was that of a charge. Lord Parker seemed to affirm this by saying in *Sinclair* v. *Brougham*[8]: "In such a case the beneficiary can only claim a charge on the property for the amount of the trust money expended in the purchase."

Such a rule would mean, however, that the beneficiary would be able only to claim the original money taken (with interest, and in priority to the creditors) and that the trustee would keep all the profits. This would be a startling result; all the more so in view of the extreme strictness with which the courts deal with cases of profits made by trustees.[9]

It appears that the appropriate remedy in such a situation is to allow the beneficiary to claim, if he wishes, a share of the fund in the proportion to which the original trust funds bore to the mixed fund at the time of the mixing. If the fund increased in value, it would be to his interest to do so. If the fund decreased in value, it would be to his interest to have a charge. This is the rule in the United States of America, and has recently been applied in Australia.[10] The principle of proportionate entitlement has been applied in England as between two persons entitled to trace into a fund[11] but never between beneficiary and trustee. Its applicability was, however, conceded in *Re Tilley's Will Trusts*[12];

> The testator's widow and executrix had paid small amounts from the testator's estate into her own account which she then used so successfully in property purchases that the modest capital with which she started became worth £94,000 at her death. She made full use of overdraft facilities allowed her by the bank, and could have carried out every one of her operations without the use of the trust money. The question on her death was whether those entitled in remainder could claim a share of the £94,000 in the proportion to which the trust money paid into her account bore to the balance in the account at the

[7] (1880) 13 Ch.D. 696; *ante*, p. 419.
[8] [1914] A.C. 398, 442; quoted and explained in *Re Tilley's W.T.* [1967] Ch. 1179 at pp. 1187, 1188.
[9] *Boardman* v. *Phipps* [1967] 2 A.C. 46; Nathan & Marshall, No. 78; *ante*, p. 370 *et seq.*
[10] *Scott* v. *Scott* (1963) 37 A.L.J.R. 345.
[11] *Lord Provost of Edinburgh* v. *Lord Advocate* (1879) 4 App.Cas. 823.
[12] [1967] Ch. 1179 at p. 1189.

time; or whether they could claim only the return of the trust money with interest. In spite of the concession relating to the beneficiary's right to a proportionate share, Ungoed-Thomas J. allowed only the return of the trust money with interest; concluding, rather surprisingly, that "the trust moneys were not invested in properties at all, but merely went in reduction of Mrs. Tilley's overdraft which was in reality the source of the purchase-moneys." [13]

This right to a share in the fund is called in the United States of America a constructive trust [14]; the theory being that it is the duty of the trustee to make over to the beneficiary that proportion of the fund which is the beneficiary's in equity. This is the remedial constructive trust [14]: "Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises." The English concept of a constructive trust is, as we have seen, different.[15] This remedy needs a name to differentiate it from a charge. Perhaps it should be called a "proportionate share." [16] The fact that a beneficiary, proceeding against a trustee, has this choice of remedy does not mean that the choice should be available in every tracing situation; a dishonest trustee is in a very different situation from an innocent volunteer.[17]

vi. The Innocent Volunteer. We have seen that the tracing remedy is never available against a bona fide purchaser for value.[18] A volunteer of course is in a different position. The usual rule in the case of volunteers is that they take the property subject to any equitable interests affecting it.[19] In the tracing situation, however, it appears from *Sinclair* v. *Brougham* [20] and *Re Diplock* [21] that a person who receives a mixed fund bona fide but without payment (the innocent volunteer) is raised to a position equal to that of the equitable owner who is entitled to trace. "But this burden on the conscience of the volunteer is not such as to compel him to treat the

13 *Ibid.* at p. 1193.
14 *Restatement of Restitution*, para. 160; *Scott on Trusts*, Chap. 13; (1920) 33 H.L.R. 420 at p. 421 (Roscoe Pound); (1955) 71 L.Q.R. 41 (A. W. Scott); (1959) 75 L.Q.R. 234 at p. 237 (R. H. Maudsley); *ante*, p. 236.
15 *Ante*, p. 222 *et seq.*
16 Sometimes called a quasi-trust. Lord Wright, *Legal Essays*, Chap. 7; (1938) 6 C.L.J. 309; (1959) 79 L.Q.R. 234 at p. 235 (R. H. Maudsley).
17 *Restatement of Restitution*, paras. 202–204.
18 *Ante*, p. 419.
19 (1948–49) 62 H.L.R. 1002 (G. K. Scott).
20 [1914] A.C. 398.
21 [1948] Ch. 465; Tiley, p. 349.

claim of the equitable owner as paramount. That would be to treat the volunteer as strictly as if he himself stood in a fiduciary relationship to the equitable owner which *ex hypothesi* he does not. The volunteer is under no greater duty of conscience to recognise the interest of the equitable owner than that which lies upon a person having an equitable interest in one of two trust funds of 'money' which have become mixed towards the equitable owner of the other. Such a person is not in conscience bound to give precedence to the equitable owner of the other of the two funds." [22] Thus the shareholders in *Sinclair* v. *Brougham* [20] and the charities in *Re Diplock* [21] were allowed to claim on an equal basis with the plaintiffs; in other words, they were treated in the same way as they would have been if they had themselves been entitled to a tracing remedy.

It is submitted that this analysis of the position of the innocent volunteer can be faulted in two ways. First, the question of conscience is irrelevant. The conscience is by definition unaffected. An innocent donee is made to take subject to the equitable rights of others because that is the fairest thing to do. Secondly, the Court of Appeal was not, as is suggested in the quotation above, faced only with the alternatives of treating the innocent volunteer as if he was either in the position of a person entitled to trace or of one being traced against.

The better solution, it is submitted, appears if the difference between the remedies of "the proportionate share" and lien are appreciated. We have seen that where a trustee or fiduciary agent is defendant the plaintiff has his choice of remedy [23]; the fiduciary surrenders the profits and stands the losses. That is a harsh rule for the innocent volunteer; he should be given his choice of the remedy to which he will submit. If the innocent volunteer has spent the money on property which has increased in value, or been applied profitably in trade, it is submitted that he should keep the increase for it has been obtained through his efforts by the use of property which he believed to be his own. He would then choose to allow the plaintiff a lien. If, however, it has decreased in value there is no reason why he should stand the whole loss; he and the claimants should take proportionate shares. Where the money has been partly dissipated but some remains, it is submitted that the innocent volunteer should be taken to be spending his own money first; but should be able in appropriate circumstances to make use of the

[22] *Ibid.* at p. 524.
[23] *Ante*, p. 425.

doctrine of change of position.[24] If the fund is completely lost, no proprietary remedy is of course available.

vii. Further Points from Re Diplock.[25] The principle of sharing *pari passu*, applied in *Re Diplock*[25] not only to the case of two claimants with an equal right to trace but also to that of a claimant and an innocent volunteer, applies whether the money is a fund in the bank[26] or is used to acquire property, stock or land.

(a) *Purchases and Sales.* If investments are purchased and then sold, the sales are similarly accounted for rateably from the two sources.[27] There is no question here of the application of the rule in *Clayton's* case,[28] for that rule, as has been seen, can only apply to the case of a continuing bank account.

(b) *Improvements to Land.* Where the mixed fund was applied in making improvements or alterations to land of the innocent volunteer, the remedy of a charge was held not available to the plaintiff.[29] There is no space here to deal in detail with the reasons which were given for this refusal, nor to suggest the answers to them.[30] The matter is related to the question, discussed above,[31] whether or not the innocent volunteer should in all ways be treated as having an equal claim to the plaintiff who is entitled to the tracing remedy. It must be sufficient here to submit that a charge on the land should have been allowed; but limited to the amount by which the value of the land had been increased by the improvements, or of course to the money spent on them, whichever is the smaller. This solution would permit the recovery of the plaintiff's money without making the charities liable for more than the benefit they had received.

(c) *Payment of Debts. Subrogation.* Payments were made to two of the charities in *Re Diplock*[32] on the understanding that the money would be used to pay off debts, one of these being an unsecured, the other a secured, debt. It was held in each case that the debt was extinguished, and, along with the security in the second case, no

[24] *Post*, p. 429; (1957) 73 L.Q.R. 48 (G. H. Jones); Goff and Jones, Chap. 42.
[25] [1948] Ch. 465.
[26] Subject to the application of the rule in *Clayton's Case* ((1817) 1 Mer. 572) to payments out.
[27] *Re Diplock* [1948] Ch. 465 at p. 546; Tiley, p. 349.
[28] (1817) 1 Mer. 572.
[29] [1948] Ch. 465 at pp. 546–548; Leaf Homeopathic Hospital (Action 11C); Westminster Hospital (Action IVA); Heritage Craft Schools (Action IVB); Queen Alexandra's Cottage Home (Action IVD); Guy's Hospital (Action IVE).
[30] Treated in detail in (1959) 75 L.Q.R. 240 at pp. 248–249 (R. H. Maudsley).
[31] *Ante*, p. 426.
[32] [1948] Ch. 465; Tiley, p. 349; Heritage Craft Schools (Action IVB) (an unsecured loan); Leaf Homeopathic Hospital (Action 11C) (a secured loan).

longer existed. The plaintiffs had no right to be subrogated to the position of the creditors.

Subrogation is a doctrine under which one person is entitled to stand in the shoes of another in respect of certain legal or equitable rights.[33] The most common application is that of a contract of insurance, or a contract of suretyship. An insurer who pays the loss is entitled to stand in the shoes of the insured in respect of his action against the party responsible for the loss.[33] Similarly, a person who pays another's debt may in some circumstances stand in the shoes of the creditor.[34] It is submitted that an application of the doctrine would have been a proper solution here. Where the defendant pays off debts with money which he should never have had, it is no hardship to him to be put back into the position he was in before using the money to pay the debts.

viii. Change of Position. The doctrine of change of position lays down that " the right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution." [35] Such a doctrine, unaccepted in English law,[36] is essential to any satisfactory system of restitutionary remedies.

The absence of such a defence to the claim *in personam* in *Re Diplock* [37] caused great hardship to those charities which had disposed of the Diplock money. In the case of proprietary remedies the doctrine applies to some extent automatically; if the property can no longer be traced, the proprietary remedy is no longer available.

But questions of change of position do arise in the context of proprietary remedies [38]; where for instance the property which is subject to the proprietary remedy has been improved by the defendant's expenditure [39]; or has been exchanged for other property [40]; or where the fund has been spent in improving the defendant's own property [41]; or has been spent in paying off secured debts of the defendant.[42] In these cases there is still some property or fund

[33] See Goff and Jones, Chap. 27.
[34] See *Re Cleadon Trust* [1939] Ch. 286.
[35] *Restatement of Restitution*, para. 142.
[36] *Durrant* v. *The Ecclesiastical Commissioners for England and Wales* (1880) 6 Q.B.D. 234; *Baylis* v. *The Bishop of London* [1913] 1 Ch. 127; *R. E. Jones Ltd.* v. *Waring and Gillow Ltd.* [1926] A.C. 670; *Ministry of Health* v. *Simpson* [1951] A.C. 251 at p. 276; (1957) 74 L.Q.R. 48; Goff and Jones, Chap. 42.
[37] [1948] Ch. 465 at pp. 502–503; [1951] A.C. 251 at p. 276; Tiley, p. 349.
[38] (1948–49) 62 Harv.L.R. 1002 (G. K. Scott).
[39] *Scott on Trusts* (3rd ed.), para. 479; *Restatement of Restitution*, para. 178.
[40] *Restatement of Restitution*, para. 142, comment (*b*); para. 178.
[41] *Re Diplock*, *supra*. at pp. 546–548. [42] *Ibid*. at pp. 548–550.

against which a proprietary remedy could be exercised. We have seen that *Re Diplock*[43] held that no tracing remedy existed in the last two cases, and that this decision was influenced by the fact that the non-availability of this defence might have made a tracing remedy inequitable in the circumstances.[44] The defence of change of position is essential to a satisfactory system of restitution, and in connection with proprietary claims it is especially relevant where the *res* or its product is still in the defendant's hands, but where it is inequitable either to compel him to hand it back to the plaintiff, or to submit to a lien to the extent of the full value of the plaintiff's claim.

E. Summary

From this discussion, it will emerge that proprietary remedies should be governed by simple rules, should be readily available, and can be helpful in achieving the ends of justice. It is submitted that the principles applicable should be the following:

1. A proprietary remedy should be available whenever the defendant is unjustly enriched at the plaintiff's expense and the personal remedy is for some reason, inadequate.

2. A plaintiff with a right to trace should have available, in appropriate cases, the remedies of lien, "proportionate share" or subrogation.

3. Where the fund is mixed the plaintiff must be able to identify his property as part of the fund and can do so by showing that his claim does not exceed the lowest intermediate balance of the mixed fund between the date of the mixing and the date of the claim. He may of course still retain a personal claim for the balance.

4. A bona fide purchaser is always protected against an equitable tracing claim.

5. The defendant should in suitable circumstances be able to rely upon the defence of change of position.

6. Though the rules are simple enough their application will involve considerable accounting difficulties. The remedies, being equitable, are discretionary, and should not be applied where their application would not be conducive to the pursuit of justice.[45]

[43] [1948] Ch. 465.
[44] [1948] Ch. 547 at p. 548.
[45] See *Cunningham* v. *Brown*, 265 U.S. 1, 44 Sup.Ct. 424; 68 L.Ed. 873 (1923) where a tracing remedy was refused in respect of a mass of claims arising out of the frauds of one Ponzi. The claimants shared equally. Taft C.J. said: "It would be running the fiction of *Knatchbull* v. *Hallett* into the ground to apply it here."

Finally, it should be said that, although the English and American rules on these matters are not identical, anyone who is faced with a question on proprietary remedies should be acquainted with paragraphs 160–162 and 202–215 of the *Restatement of Restitution*, whose authors have foreseen and provided solutions for most if not all of the problems which have arisen in the English cases.[46]

[46] Including that of the personal claim in *Re Diplock* ([1948] Ch. 465); see *Restatement of Restitution*, para. 126, comment (*c*), and *Restatement of Trusts*, para. 199.

PART V

EXECUTORS AND ADMINISTRATORS

CHAPTER 23

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1. General

A. Appropriate Courts

i. The Probate Jurisdiction. The law governing the administration of the estates of deceased persons falls into two separate sections. The first section, which is assigned to the jurisdiction of the Probate, Divorce and Admiralty Division of the High Court of Justice, governs the grant of legal representation in respect of the estate (for example the grant of probate of a will to the executor named in the will of the deceased person); and also all questions concerning the validity of any will left by the deceased, including his capacity to make a will and the satisfaction of formal requirements for the execution of such a will. This jurisdiction originated in the powers of the ecclesiastical courts after the Norman Conquest to deal with succession on death to personal (but not real) property, and was transferred to a new secular court in 1857.[1] The modern Probate Division is the successor of this court. Until 1897, real property descended directly to the heir on intestacy and, since 1540,[2] to a devisee by will, *i.e.*, a person to whom the property was given by the terms of a will. The persons appointed by the ecclesiastical courts to administer the estate of a deceased person were known as personal representatives, as their powers extended to personal property only. This term is now used, however, despite the extension of their powers to all kinds of property by statutes of 1833 [3] and 1897.[4]

ii. The Chancery Jurisdiction. As a result of the Reformation and the Civil Wars the ecclesiastical courts, though still able to issue legally recognised grants of probate and administration, found it increasingly difficult to force personal representatives to give an account of their administration, whereas the ordinary courts were unable to devise a suitable procedure for the purpose. During the Commonwealth period a common law action was allowed for the

[1] Court of Probate Act 1857.
[2] Wills Act 1540.
[3] Administration of Estates Act 1833.
[4] Land Transfer Act 1897.

recovery of a legacy,[5] but such an action was later denied.[6] Thus the Court of Chancery, to avoid a failure of justice, assumed jurisdiction to control the administration of estates, and this has become an important part of the jurisdiction of the Chancery Division since the Judicature Act 1873. The common law courts for centuries controlled the destinies of real property passing on death, but modern legislation has assigned the whole law of the administration of estates to the Chancery Division. In order to enforce the provisions of a will the Chancery must first interpret its meaning, and has therefore also become the "court of construction."

iii. Proposals for Reform. This dichotomy of jurisdictions has been criticised as illogical and it has often been suggested that the Chancery assume the whole of the Probate jurisdiction as well. Most probate work is in fact performed by the Probate Registry, however, and there seems no point in trying to add this work to the administrative work of the Chancery.[7] There are occasional conflicts, as where the Probate judge provisionally construes the meaning of a will, *e.g.*, in order to decide if anyone is named executor therein and therefore entitled to a grant of probate and the Chancery judge later construes the will differently, but such cases are uncommon in practice.[8]

B. Unification of the Law

All property now passes on death to the personal representatives, whatever its nature. The rules of intestate succession are now also the same for all kinds of property, and all special rules of descent have been abolished.[9] The Legislature has introduced a few specific exceptions; for example, the powers of one of several personal representatives to dispose of property do not extend to land,[10] and "assents" to the passing of land to the persons entitled under a will also require certain formalities.[11] In some cases the courts have created anomalous differences, in refusing, for example, to pay legacies out of residuary real estate in spite of the words of a statute.[12]

[5] *Butler* v. *Butler* (1657) 2 Sid. 21; *Tooke* v. *FitzJohn* (1657) Hard. 96; *Nicholson* v. *Shirman* (1661) Raym. 23, 1 Sid. 45.
[6] *Deeks* v. *Strutt* (1794) 5 T.R. 690.
[7] Final Report of the Evershed Committee (1953) Cmd. 8878, p. 309.
[8] *Cf. In the Estate of Fawcett* [1941] P. 85.
[9] A.E.A. 1925, s. 45.
[10] *Ibid.* s. 2 (2).
[11] *Ibid.* s. 36 (4).
[12] *Re Rowe* [1941] Ch. 343, *post*, p. 471.

C. The Different Kinds of Succession

i. Wills. It is common practice in England for owners of property to make wills, and they enjoy freedom of testation, that is to say, the right to leave their property to any person they wish subject to certain modern statutory restrictions.[13] The law of wills consists of two types of rules, the imperative rules which a testator must observe, such as the need to sign his will; and the dispositive rules which are concerned with understanding the wishes expressed in his will and giving effect to them.

ii. Intestacy. Where no valid will is made, property is distributed by law according to a uniform set of rules applying to all deaths. These rules are laid down by statute[14] on the basis of an analysis of the terms of typical wills, so that they may be said to constitute a statutory testament. If an otherwise valid will is made but fails to dispose effectively of the whole estate of the testator, a partial intestacy is said to occur. The property undisposed of is distributed on the basis of the normal intestacy rules but the effect of the will may have to be taken into account.[15]

iii. Property Vesting in Personal Representatives on Death. A number of apparent assets of a deceased person do not vest in the personal representative of the deceased and do not therefore fall strictly within the law of administration of estates. A gift in contemplation of death is one instance, the subject of it passing directly to the donee, but it shares some characteristics of a succession on death, and will be referred to later.[16] Entailed property passes to the next tenant in tail by force of the original gift and does not come within our subject[17] unless the person presently entitled to an entail exercises his modern statutory power to dispose of it by will as if he were absolutely entitled.[18] Legislation has created various situations in which property passes on death otherwise than strictly by way of succession, as where a nominee takes the benefit of a Post Office Savings Account,[19] or where a widow enforces a life assurance policy effected by her late husband.[20] Needless to say, property subject to a settlement often passes on death but not by way of succession; where it was given to A for life and then to B, and A

13 *Post*, p. 466.
14 A.E.A. 1925, s. 46, as amended; *post*, p. 463.
15 A.E.A. 1925, s. 49 (1), as amended; *post*, p. 464.
16 *Post*, p. 445.
17 A.E.A. 1925, s. 51 (4).
18 L.P.A. 1925, s. 176.
19 Post Office Savings Regulations 1938 (S.R. & O. 1936 No. 556).
20 Married Women's Property Act 1882, s. 11.

dies, B takes under the terms of the original settlement and not in any sense as a successor to A's property.[21]

2. The Executor

A. The Appointment of an Executor

An executor can only be appointed by a will. Indeed a will may merely appoint an executor and make no disposition of property. On the other hand, a will may be valid today without any such appointment, though certain inconveniences result.[22]

An executor's title dates from the death of the testator, and has many advantages over the title of other representatives.[23] It is also very unusual for an executor to be refused a grant of probate if he applies for it. It appears, however, that the Probate Court has inherent power to pass over an executor in a suitable case.

> In *Re Leguia*[24] a foreign national died leaving considerable assets in England, but not sufficient to pay his creditors. His will appointed an executor but there was evidence that the latter had no intention of applying for a grant. The court made a grant, therefore, to the English creditors, without even giving the executor an opportunity of appearing. In the more recent case of *Re Biggs*,[25] the executors appointed by the will were aged and infirm and were meddling with the estate without intending to apply for a grant of probate. The court considered that there were sufficient grounds to pass them over and make the grant to another person.

An executor is not required to give any security to the court for his proper administration of the estate, whereas this is required of other administrators.[26] And a sole executor may act where two or more administrators would have to be appointed.[27]

B. Capacity to Act as Executor

Any person of full age and sound mind may so act. An infant cannot act as executor or obtain a grant,[28] but may be appointed an executor and apply for a grant on attaining full age.[29]

[21] The trustees of the settlement become the "special representatives" of the tenant for life in relation to settled land: A.E.A. 1925, s. 22. With personalty, the trustees continue to administer the fund.
[22] See *post*, p. 455, as to the procedure for a grant in such cases.
[23] See *post*, pp. 443, 465.
[24] [1934] P. 80.
[25] [1966] P. 118, applying Judicature Act 1925, s. 162, which refers to "special circumstances" for passing over the executor.
[26] See *post*, p. 465.
[27] Judicature Act 1925, s. 160 (1), (3); *Re Hall* [1950] P. 156, but the court may appoint a second executor under s. 160 (2).
[28] *Ibid.* s. 165.
[29] *Post*, p. 453.

C. Method of Appointment of Executor

i. Form. A will should, to avoid all doubts, appoint one or more executors in so many words. There is, however, no rigid requirement to that effect, provided it is clear that the person named was intended by the wording of the will to act in the way in which an executor acts; as where a person is asked to pay debts and distribute the net estate. An executor not specifically so named is called "executor according to the tenor" (*i.e.*, as gathered from the meaning of the will). Persons expressly appointed trustees by a will are often held to have been intended to act as executors as well.

> In *In the Estate of Fawcett* [30] the testatrix appointed a bank her executor and trustee, by a will executed in 1931. In 1940 she executed a fresh will, directed some additional gifts to be made, and concluded that the bank "will do this." It was held that this was a sufficient, if rather informal, indication that the bank should be her executor according to the tenor under the 1940 will.

ii. Special Types of Executors. Separate executors can be appointed for separate pieces of property or for domestic and foreign property, or to act in default of acceptance of the office by prior executors. The most important practical example is the statutory executorship which applies where a title passes on death under a settlement of land.[31] Where land is settled on A for life and then to B, and A dies, the law provides that the legal title shall vest in the trustees of the settlement. If A has made a will of his own property he is deemed, by a statutory fiction, to have appointed the trustees "special executors" in respect of the settled land.[32]

iii. The Chain of Representation. A will is required for the appointment of an executor, but it need not be the testator's own will. There is a very ancient principle that if A appoints B his executor, and B appoints C his executor, and B dies after proving A's will but without completing the administration of A's estate, C can step into B's shoes, on obtaining a grant in respect of B's estate, and deal with A's estate without applying for any further grant to A's estate itself. This example has been deliberately chosen, as there are many situations in which the chain is broken; if A appoints two executors, X and Y, both of whom obtain probate, and

[30] [1941] P. 85.

[31] A.E.A. 1925, s. 22 (1).

[32] It is not easy to see why the trustees are not deemed so appointed if A dies intestate, as the property ceases to be his on his death, but the law requires them to apply for a grant of special administration in such a case; see *post*, p. 465.

X dies, Y continues as executor. Anyone appointed as executor by X is not concerned. Again if A appoints B his executor, and B appoints C his executor, and either B or C fails to obtain probate of his respective testator's will, letters of administration will have to be applied for.

iv. The Executor de son tort. In essence an executor *de son tort* is a person who presumes to act as executor without being so appointed by will. The acts must show a claim to dispose of the testator's property and go beyond mere provisional steps to secure assets or compile lists of claims.[33]

> In the leading case of *New York Breweries Co.* v. *Att.-Gen.*[34] the executors of a testator who died domiciled in New York wrote to an English company asking it to transfer his shares to them and pay them the dividends due to the deceased. The company knew that the executors had no intention of obtaining probate in England, yet they fulfilled the request. They were held to be liable as executors *de son tort*.

Any person receiving any part of an estate without having any right to it or without paying for it, is also treated as an executor *de son tort*.[35] He is not entitled to be credited with any payment made unless the payment is one which an executor might properly have made.[36]

A person appointed executor by will is not regarded as acting wrongfully if he behaves as an executor before probate. In that situation, however, he runs certain risks similar to those run by a wrongful executor, for he does not at that stage enjoy the important protections conferred by statute upon an executor acting under a grant of probate.

D. Acceptance and Refusal of the Office of Executor

The duties of an executor are onerous; an executor is unpaid unless the will otherwise provides. No executor is therefore bound to undertake the office, even if he promised the testator to do so. On the other hand, once he has begun to administer, he will lose the right to renounce the executorship and the test here is the same as in the case of the wrongful executor, whether he has purported to pay debts or dispose of assets of the estate.

[33] A.E.A. 1925, s. 55 (1) (xi), refers to an executor *de son tort* as "any person who takes possession of or intermeddles with the property of a deceased person without the authority of the personal representatives or the court." *Cf.* "Trustee *de son tort*," *ante*, p. 225.
[34] [1899] A.C. 62.
[35] A.E.A. 1925, s. 28.
[36] *Fyson* v. *Chambers* (1842) 9 M. & W. 460; A.E.A. 1925, s. 28.

In *Holder* v. *Holder*[37] a testator appointed three executors, who opened an executors' bank account on his death, all three signing cheques, and all concurring in appointing a solicitor to act for them. The Court of Appeal affirmed the rule that an executor cannot renounce probate after acting, but held the participation in these acts to be of a technical or minor character and not such as to preclude an executor from renouncing probate.

Once an executor has formally accepted his office or has obtained a grant of probate or begun to act, he has no power to retire without the leave of the court; the modern statutory provisions which allow trustees to retire[38] do not apply to personal representatives.[39]

Where an executor wishes to renounce the office and is still free to do so, he should file a written renunciation in the Probate Registry.[40] In exceptional circumstances he may be allowed to retract this renunciation if it is for the good of all parties interested in the estate.[41] It may be inconvenient, of course, if a grant of administration has meanwhile been made to someone else, but this is a matter for the court to consider.[42]

Probate need not be applied for within any specified time; but if an executor delays for a long period in making up his mind whether or not to act, he may be cited to take out probate promptly or lose his right for good.[43]

Executorships are offices of personal confidence and cannot be assigned. This is obvious in the case of ordinary persons but it also applies where the executor is a corporation.

In *In the Estate of Skinner*[44] a testator had appointed the G. Bank his executor. After his death the G. Bank was amalgamated with the N. Bank and one of the terms of the amalgamation was that the G. Bank should not take out any further grants of probate. The court held, however, that the G. Bank alone could apply, and that its rights could not be assigned to the N. Bank so as to enable the latter to apply for probate.

E. The Position of the Executor Before Probate

The title of the executor to the testator's estate vests on the

37 [1968] Ch. 353; *ante*, p. 369.
38 T.A. 1925, s. 39; *ante*, p. 306.
39 T.A. 1925, s. 68 (17), is excluded by the special position of the executor as appointed by court order and not agreement.
40 Non-Contentious Probate Rules 1954, r. 35.
41 *In the Estate of Heathcote* [1913] P. 42.
42 A.E.A. 1925, s. 6.
43 Non-Contentious Probate Rules 1954, rr. 46, 47.
44 [1958] 1 W.L.R. 1043.

latter's death and the grant of probate is only required in order to authenticate it.[45] Provided the will under which he acts turns out in fact to be the true and last will of the testator, the executor can perform a number of acts effectively without applying for probate; he may pay any debts properly owing and in the proper order, and may pay legacies. However, he will run serious risks if he pays legacies without obtaining probate; for, if a later inconsistent will is then discovered, he will have no statutory protection.[46] Debts are not safely discharged by payment to an executor without production of the probate, and banks and debtors will not therefore generally make payments beforehand. A purchaser of land will also refuse to accept anything less than the probate as proof that the executor has acquired title to dispose of the land.[47]

3. Outline of the Law of Wills

This part of the law does not fall within the Chancery jurisdiction; but a short account is given here because it is felt that the position of the executor, who is accountable to the Chancery Division, cannot otherwise be understood.

A. The Duties of the Executor with Regard to the Will

It is the duty of the executor to propound the will, under which he is appointed, by application to the Probate Registry.[48] For this purpose he must satisfy himself of the validity of the will and of the fact that it is the testator's last will. He must also carry out the provisions of the will, applying, if necessary, to the Chancery Division for a ruling on its interpretation. These problems will be dealt with successively.

B. The Capacity of the Testator to Make a Will

There being no initial presumption of a testator's sanity, the executor must be prepared to prove that the testator had sufficient testamentary capacity when he made his will. Of course, if the will appears from examination to be a rational document, the presumption shifts and it is then for any person contesting the will to give some reasons for doubting the sanity of the testator. The law requires a testator to understand that he is disposing of his property, and how he is dealing with it, and to be clear in his mind about any possible moral claims of his family.

[45] *Woolley* v. *Clark* (1822) 5 B. & A. 744.
[46] A.E.A. 1925, s. 27.
[47] *Newton* v. *Metropolitan Railway* (1861) 1 Dr. & Sm. 583.
[48] *Post*, p. 453.

In the leading case of *Banks* v. *Goodfellow* [49] the testator had been confined in lunatic asylums and still believed he was pursued by evil spirits. He was, however, a good business man, and on the date when he made his will had transacted some business with the man named executor in the will. The court refused to set aside a jury verdict in favour of the will, as it considered that the testator's defects of mind had not influenced his intention to make the will or his choice of beneficiary.

The testator must be of full age, except in the case of privileged wills.[50]

C. The Form of Wills

i. General rule. Every will requires certain formalities, with the exception of servicemen's wills to be considered later. Assuming that the testator is a British subject domiciled in England and makes his will in England [51] he must comply with the formal provisions of English law.[52] This requires the will to be in writing and to be signed at the end by the testator and two attesting witnesses. If the testator cannot write he may authorise someone else to sign for him or may make a mark.

In *Re Chalcraft* [53] the testatrix had made a will in July 1946 and executed a codicil to it in December 1946 on her sickbed. She gave instructions for the codicil and nodded as it was read over to her but she could not speak clearly. She attempted to sign her name but only completed part of it. This was held to be a sufficient signature as her intention to sign was clear.

Both witnesses must be present when the testator signs the will or acknowledges his signature,[53a] and the testator must be present when the witnesses attest the will, but the courts have construed this requirement generously in deciding when someone is "present" for this purpose. But a blind person cannot witness a will; he is not present in the sense of being able to observe the will being signed or to see the signature which is being acknowledged, any more than a sighted person in a distant place or where a signature is sealed inside an opaque envelope.[54]

[49] (1870) L.R. 5 Q.B. 549, especially at p. 565; foreign law was freely referred to in this case.
[50] *Post*, p. 445.
[51] The Wills Act 1963 allows foreign forms to be used in other cases, even as respects English land.
[52] Wills Act 1837, s. 9; *ante*, p. 122.
[53] [1948] P. 222.
[53a] *Re Groffman* [1969] 2 All E.R. 108.
[54] *Re Gibson* [1949] P. 434.

It is a wise precaution to use an attestation clause at the end of a will which will recite compliance with the statutory requirements, since this raises a presumption of due execution and dispenses with the need to trace the attesting witnesses or give any other proof of due execution.[55]

ii. Privileged Wills. Members of the armed forces while on military service and merchant and naval seamen at sea can make valid wills even while under age and without observing any formalities.[56] Although this privilege, based on Roman law, was originally justified by the absence of normal legal facilities it is not so limited today, and it is sufficient if the soldier is away from home on duty, even if in a city.[57] Although the concession refers to military service it is not limited to cases where war has been formally declared; it is sufficient that operations of a military nature are in progress or imminent or have recently been concluded.

> In *In the Estate of Colman* [58] a serviceman under 21 made a will while in the Army of Occupation in Germany nine years after the end of hostilities. He died later in England as a result of an accident after he had returned to civilian life. It was held that his will had been made while he was on "actual military service."

D. Donatio Mortis Causa

Apart from the privileged service wills, English law, unlike some foreign systems, does not recognise informal emergency wills. A partial substitute is provided by a "*donatio mortis causa*" which takes the form of a transfer of money or goods, but, unlike an ordinary gift, is revocable if the expected death does not occur.[59] Again, unlike an ordinary gift, it is sufficient if some clear evidence of title to property is transferred, not being itself a proper full transfer of title, such as the handing over of an insurance policy without formal assignment, the gift of a cheque payable to the donor without his endorsement.[60]

Strictly speaking, the title to such property passes directly to the donee without the intervention of the executor.[61] But the executor

[55] Non-Contentious Probate Rules, r. 10. However, this presumption can be rebutted, as where the attesting witnesses later swore the testator had not signed until after their attestation, *Re Vere-Wardale* [1949] Ch. 395.
[56] Wills Act 1837, s. 11 (as amended).
[57] *Re Wingham* [1949] P. 187; Tiley, p. 384; (1950) 66 L.Q.R. 318 at pp. 337–338 (H. G. Hanbury).
[58] [1958] 1 W.L.R. 457.
[59] *Edwards* v. *Jones* (1836) 1 My. & Cr. 226.
[60] *Ante*, p. 152; and see *Birch* v. *Treasury Solicitor* [1951] Ch. 298; Tiley, p. 191.
[61] *Tate* v. *Hilbert* (1793) 2 Ves.Jr. 111 at p. 122.

may reclaim the property if the estate is otherwise insufficient to pay the donor's debts.[62] If the gift has been revoked the executor will also have to reclaim it for the benefit of the estate. He will also have to report the fact of the gift and its amount, if known to him, to the revenue authorities [63] as it may be liable to estate duty.[64]

E. Revocation of Wills

i. General. As a will is the expression of the "last will" of the testator it is essentially revocable. There are three main types of revocation, *viz.*, automatic revocation, formal revocation and physical revocation, though these are not actual terms of art in English law.

ii. Automatic Revocation. At one time a will was revoked by marriage or by the birth of further children, requiring the testator to re-examine the wisdom of his dispositions. In modern times the only instance of such revocation is revocation by the subsequent marriage of the testator.[65] It is immaterial whether the will makes provision for a future wife in the abstract or not. However, if it is made in express contemplation of marriage to a named person and such marriage then takes place, the will is not revoked, whether or not it makes adequate or any provision for the spouse.[66] The courts have relaxed the meaning of "express" and allowed it to cover any reference to a future wife who is identified as such.

> In *Pilot* v. *Gainfort* [67] Frederick Pilot's wife left him in 1921. In 1924 Pilot met Diana Featherstone and lived with her till his death. In 1928 he lawfully married Diana, his first wife having disappeared for seven years. Pilot's will was drawn up in 1927 and left his estate to "my wife Diana Featherstone Pilot." The court held that the will substantially expressed a contemplation that the testator would marry Diana as soon as it became possible to do so, although a reference to "my wife" would normally refer to an existing wife.

iii. Formal Revocation. This can be done by any valid later will or codicil, whether or not it contains dispositions of property.[68] Formal revocation may take one of two forms:

(a) Express revocation by a clause revoking former wills in whole or in part;

62 *Drury* v. *Smith* (1717) 1 P.Wms. 404.
63 F.A. 1894, s. 8 (3).
64 Customs and Inland Revenue Act 1881, s. 38 (2) (*a*); F.A. 1894, s. 2 (1) (*c*).
65 Wills Act 1837, s. 18.
66 L.P.A. 1925, s. 177.
67 [1931] P. 103.
68 *In bonis Durance* (1872) L.R. 2 P. & D. 406.

(b) Implied revocation, where the provisions of a new will or codicil are inconsistent with those of the original will, but only to the extent of the inconsistency.[69]

iv. Physical Revocation.[70] This requires an act of complete destruction or disposal of the will, or at least of the signatures and attestations at the end,[71] by the testator himself or by some person in his presence and by his direction. It also requires an intention to revoke, just as a will requires an intention to dispose, and a testator must equally have capacity to revoke; thus, a lunatic cannot revoke his will by destroying it.[72]

v. Obliteration. Although this is dealt with by a separate section of the statute, in principle it resembles the case last given. A testator can revoke a part of his will by destroying it or by cutting it out.[73] Hence he may also revoke any part of his will by completely obliterating it, so that its sense is no longer apparent.[74]

It will be noted that physical destruction is a type of revocation which escapes the requirement of attestation by witnesses, and there is often considerable difficulty in deciding who destroyed or obliterated a will, and with what intent. There is, however, a useful presumption, where a will which once existed cannot be found, that it was destroyed by the testator with intent to revoke it.[75] This presumption can be rebutted if, for example, the testator was of doubtful sanity and had no reason to revoke it.[76] In such cases copies or other evidence of the contents are admissible to probate, again without attestation.

vi. Dependent Relative Revocation. A testator can only revoke a will if he intends to do so. The courts have evolved a curious doctrine of a conditional or relative revocation, according to which a revocation is ineffective if it can be shown to have been conditional on a new testamentary disposition (which fails) being effective. Thus it has been applied where:

(a) the testator revoked his will under a misapprehension as to the consequences, for example, if he believed that this would revive an earlier will[77]; or

[69] *Cadell* v. *Wilcocks* [1898] P. 21; a power of appointment was held to be unaffected because it was not referred to.
[70] Wills Act 1837, s. 18.
[71] *In bonis Lewis* (1858) 1 Sw. & Tr. 31.
[72] *Brunt* v. *Brunt* (1873) L.R. 3 P. & D. 37.
[73] *Re Nunn* (1936) 52 T.L.R. 322.
[74] Wills Act 1837, s. 21.
[75] *Allan* v. *Morrison* [1900] A.C. 604.
[76] *In the Estate of Yule* (1965) 109 S.J. 317.
[77] *Re Bridgewater* [1965] 1 W.L.R. 416; *cf. Re Feis* [1964] Ch. 106.

(b) if the testator revoked his will with the intention of executing a further will but never did so [78]; or

(c) if the testator substituted different provisions for the original provisions but the new ones are legally ineffective.[79]

In *In the Estate of Southerden* [80] John, by his will executed in September 1921 on the eve of a voyage, left all his property to his wife. In November 1921 he emptied his pockets and found the will, which he burnt, saying, "It is no good now; we have returned safely and it is all yours." When he died in 1923 his estate consisted of land, which under the then law of intestacy passed to his father and not to his widow. The Court of Appeal held that the revocation of the will was intended on an assumption as to the consequences which was incorrect and therefore the will remained valid.

F. Revival

Revival of a revoked will requires a valid will showing an intention to revive the revoked will.[81] A will can be revived wholly or in part. There are many reported cases where testators have become confused as to the state of their existing wills and made references to revoked instruments, and where successive solicitors have drafted wills without knowledge of other wills. The decisions are not easy to reconcile and the ascertainment of the intention to be ascribed to a testator is often highly problematical.[82]

G. Interpretation of Wills

i. General. An executor must first construe a will before he can safely carry out its provisions. Although an executor can be given powers and discretions, like a trustee, to select the persons to benefit under a will,[83] he cannot be authorised by the testator to construe the will as he thinks fit.[84] Instead, he must take legal advice in any case of difficulty and, if this interpretation is disputed, must resort to the Chancery Division for a ruling.

There are many reported decisions on the meaning of words in a will, though each of these must be read in the light of the provisions of the particular will as a whole; thus, a reference to

78 *Dixon* v. *Treasury Solicitor* [1905] P. 42.
79 *Ex p. Lord Ilchester* (1803) 7 Ves. 348.
80 [1925] P. 177.
81 Wills Act 1837, s. 22.
82 *Re Pearson* [1963] 1 W.L.R. 1358.
83 As with a power of appointment, *ante*, p. 104 *et seq.*; or under a discretionary trust, *ante*, p. 180.
84 *Re Wynn* [1952] Ch. 271; *ante*, p. 310.

"children" in one clause may be read as including illegitimate children if other provisions of the same will suggest that the testator meant to include them.[85] A few principles are more or less clear:

(a) that words are normally given their ordinarily accepted contemporary meaning;
(b) that one must gather the meaning from the document and not generally from other evidence, the Chancery being far stricter than the Probate Division in excluding evidence of actual intention;
(c) that an interpretation is to be favoured which will carry out the clear intentions of the will as a whole;
(d) that a will is to be made as effective as possible and to dispose of as much property as possible;
(e) that no interpretation may contradict the words of the will.

ii. Equivocation. If a description of a legatee fits several persons equally well, the law exceptionally allows evidence of actual intention, as this neither contradicts the will nor allows the will to be entirely frustrated. In the leading case of *Re Jackson*[86]:

> The testatrix, Mary Jackson, by a will executed in 1921 left property to "my nephew Arthur Murphy." In fact she had three nephews of that name, one legitimate and living locally, one legitimate and living in Australia, and one illegitimate. In a previous will she had made a gift to the last one. The court held that a single legitimate nephew called Arthur would have had an unanswerable claim; but as at least two persons satisfied the description, evidence was admissible as to the testatrix' intentions. This evidence disclosed that the illegitimate nephew had been the testatrix' business manager and had married one of her sisters. He therefore took the property.

If part of a description fits one person or thing better than another, the court tries to decide on which part the testator is least likely to have been mistaken. If a testator, owning leaseholds at X and freeholds at Y, made a gift of "my freeholds at X," he is likely to have meant the land there situated and to have been confused about the nature of his title.[87]

iii. Uncertainty. A testator must make his intentions sufficiently plain that a court can decide whether his executor is acting properly

[85] *Re Hyde* [1932] 1 Ch. 95. See now Family Law Reform Act 1969, s. 15, *post*, p. 451.
[86] [1933] Ch. 237.
[87] This is the so-called "*falsa demonstratio*" rule. Of course few cases are as simple as this and decisions are contradictory.

or not. Thus a trust for any person "associating with A" has been held bad as the degree of association cannot be determined.[88] A testator cannot delegate to any other person the making of his will. On the other hand, as we have seen, he can give a power of appointment to his executor or some other person and here the law is satisfied if the particular appointment made can be justified. Thus a power to give £25 to any friend of the testator is good and the donee of the power can safely pay an intimate friend accordingly.[89]

iv. References to Persons. An identification of a legatee by name seldom leads to any difficulties, but the same cannot be said of descriptions, *e.g.*, "to my wife," or "to my sons" where the testator has married several times, or has had some children before and some after the will. The law assumes, where a unique description such as "my wife" is used, that the testator is referring to the woman who is his wife at the time of the will.[90] If the will is confirmed by a later will or codicil after his wife dies, a later wife may be allowed to benefit, as the later document is said to "republish" the will as if it had then first been executed.

> In the leading case of *Re Hardyman*,[91] a testatrix, by her will executed in 1898, left a legacy to her cousin Colonel McClintock and to his wife if she survived him. In January 1901 the Colonel's then wife died. Testatrix knew of this fact when she made a codicil in November 1901 without referring to the 1898 will. The Colonel remarried in 1903 and died in 1924. The court held that the codicil required the 1898 will to be construed in the light of the facts known to the testatrix in November 1901, so that the Colonel's second wife qualified for the gift as the first wife could not have been intended at that date.

In gifts to a class of persons whose numbers may vary, *e.g.*, "to my sons," all sons alive at the time of the testator's death will generally take. If the gift is in favour of the children of some other person, who is childless at the time of the testator's death but capable of having children, the gift can be suspended and will be divided among the children later born, if any.

In some cases members of a class may be excluded by the effect of the technical "class-closing" rules.[92] Thus if a testator leaves

[88] *Re Allan* [1958] 1 W.L.R. 220.
[89] *Re Coates* [1955] Ch. 495; *ante*, p. 105.
[90] This follows from the rule of "putting yourself into the testator's shoes" at the time of the will.
[91] [1925] Ch. 287.
[92] M. & W., pp. 237, 508; Cheshire, p. 272.

property "to X's children" it will go to X's children living at the testator's death, to the exclusion of a later child of X. The reason is that it would be unfair to X's existing children, who are clearly entitled, to have to wait until X dies in case X has more children.[93] Hence if, for any reason, the existing children have no right to take the capital anyway, the class will remain open.[94]

Words like "wife," "children," and "issue" have usually been construed as referring to lawful wives, children and issue. By Family Law Reform Act 1969, s. 15, however, the disabilities of illegitimate children are largely removed. In the case of dispositions made after the Act comes into force, references to a child, or other relative, include references to illegitimate children, and to persons related through an illegitimate person. A lawful child may include a child born illegitimate if its parents marry before the testator's death,[95] or if the "marriage" of the parents was believed by at least one of them to have been valid.[96] The position of adopted children is extremely complicated, as English law only accepted the idea of adoption very late and limited its effects on property rights derived from third parties. The long-term rule is that where a will is executed or republished on or after April 1, 1959, any child adopted before the death of the testator may benefit under a gift to the adoptor's children under a will.[97]

A posthumous child will be treated as already born when the testator died, if such a construction directly benefits it.

> In *Elliot* v. *Joicey* [98] Rose Elliot left property to her children provided they left issue surviving them. Her son Thomas had one child, a posthumous son born a month after his death. The House of Lords held that Thomas' son had not technically survived Thomas as they had never been contemporaries, and that the fiction of survival would not be applied, as the grandson would not in the circumstances benefit from it directly even though he stood to take on Thomas' dying intestate in the event.

Gifts to a class in a will are generally, and in the absence of a contrary intention, divided *per capita*; thus if there is a gift of a

[93] *Re Stephens* [1904] 1 Ch. 322. If the gift is to A for life and then to such of A's children as attain the age of 21 the class will not close until some child attains 21 and A has died, since no capital can be distributed until both events happen; see *Re Wernher's Settlement Trusts* [1961] 1 W.L.R. 136.

[94] *e.g.*, where there is a discretionary trust for members of the class, *Re Ward* [1965] Ch. 856.

[95] Legitimacy Act 1926, s. 3.

[96] Legitimacy Act 1959, s. 2.

[97] Adoption Act 1958, ss. 16 (2), 17 (2), Sched. IV, para. 4 (3). In other cases the adoption must precede the making of the will.

[98] [1935] A.C. 209. See (1950) 66 L.Q.R. 318 at p. 339 (H. G. Hanbury).

single sum or piece of property "to A's and B's children," all such children take equally, regardless of whether A's children outnumber B's.[99]

v. Vested and Contingent Gifts. Gifts in a will or settlement may be vested or contingent. A gift is vested if the identity of the beneficiary is known and he has no further condition to perform. Thus, if property is left to A for life with a gift over to B absolutely, B takes a vested interest. If B should predecease A, B's estate will take the benefit in his place. B's surviving A is not treated as a condition. But if the property is given to B conditionally on his surviving A, he must do so or lose the benefit. Sometimes an apparently contingent gift is construed by the court as vested but subject to divesting. For example, in a gift to X at 21, but if he dies under that age to Y, X will take the property, but will lose it if he dies under 21. Further, in the case of a gift to the children of X (or to them at 21) each child obtains a vested interest at birth (or on attaining 21), subject, however, to open and to let in future-born children (or children who attain 21). To construe gifts as vested whenever possible works in favour of validity of the gift; first, because a vested gift is not subject to the perpetuity rule[99a]; and secondly, because a gift which is vested subject to divestment becomes absolute and unconditional if, for any reason, the divesting event does not or cannot occur or be given legal effect.

> In *Hancock* v. *Watson*[99b] Richard Hancock left part of his property to Mrs. Drake with a direction that she should only have the income for life, after which the capital was to go to such of her children by any marriage as attained the age of 25, with a gift over, in default of such issue, to the testator's nephews and nieces. The gift to the Drake children was void for perpetuity under the then state of the law and the nephews and nieces claimed. The House of Lords held that the initial gift to Mrs. Drake was absolute; the direction alone was void for perpetuity and could be disregarded.

vi. References to Property. As it is of the nature of a will to dispose of the whole of a man's property on his death, references to property are deemed to include all property of that description which belonged to the testator at the time of his death, not of the will.[99c] This is subject to contrary intention, *e.g.*, a gift of "the

[99] *Re Alcock* [1945] Ch. 264; *Re Hall* [1948] Ch. 437.
[99a] See Perpetuities and Accumulations Act 1964.
[99b] [1902] A.C. 14; Nathan & Marshall, No. 66; *Lassence* v. *Tierney* (1849) 1 Mac. & G. 551.
[99c] Wills Act 1837, s. 24.

shares in the XYZ Co. which I now own," will be interpreted as applying to the shares the testator owned at the time of the will. Even in this case, however, republication will up-date the will so as to cover all such shares owned at the date of republication.[1]

Dispositions of property should use clear and unambiguous terms such as a reference to "all my real and personal estate of every description." In practice many wills are home-made and do not use the correct technical terms. The word "land," which is not strictly a term of art, will generally pass all the testator's interests in land, whether freehold or leasehold.[2] The interpretation of the term "money" has had a chequered career. In its strictest sense it refers to cash in hand or in a current account or out on loans repayable on demand. But where used as a general term and especially if it is not followed by a residuary gift, the word may be given the wider meaning of assets or fortune, to prevent an intestacy.

> In *Perrin* v. *Morgan*[3] Emily Morgan left a considerable estate, most of it invested in stocks and shares. Her home-made will left all her "moneys" to her nephews and nieces, and contained no residuary gift. The House of Lords held that the word meant "assets" in this context and covered the stocks and shares.

Obviously such a construction could not have been adopted if there had been the usual residuary gift of all other property to someone else.

4. The Grant and Revocation of Probate of Wills

A. Procedure for Grant

i. Common Form. The executor who propounds a will must establish that the death of the testator has occurred and swear that the will is the true and last will of the testator.[4] Unreasonable delay in applying for probate will have to be explained.[5] A statement of the value of the estate will have to be prepared for estate duty purposes. Probate usually follows as a matter of routine if there is the usual attestation clause in the will.[6] In other cases affidavits will have to be obtained from one of the attesting witnesses to confirm that the will was duly executed.

ii. Solemn Form. If the validity of the will is disputed a more solemn procedure is followed. The executor will have to produce

[1] *Re Fraser* [1904] 1 Ch. 726.
[2] Wills Act 1837, s. 26.
[3] [1943] A.C. 399, especially at pp. 406 *et seq.*, 412, 418, 421.
[4] Non-Contentious Probate Rules, r. 6.
[5] No period of limitation applies; this is a matter of practice.
[6] *Re Webb* [1964] 1 W.L.R. 509.

prima facie evidence that the will complies with the statutory formalities and that the testator was mentally able to make a will. The Probate judge decides the case, occasionally sitting with a jury.[7] There is no exclusive preference for any particular type of evidence. The judge may, for example, decide a will is good even if the attesting witnesses give evidence of non-compliance with forms. The court may rely on affidavits by deceased witnesses or even on hearsay statements made by them.[8]

iii. Lost Wills. If the will once existed and was properly executed and not revoked[9] and its disappearance is accounted for, the court may allow a carbon copy to be produced or the draft instructions for the will. In an extreme case a person who has examined the will or even a person who heard it read out may recite the text from memory

> In the case of *Sugden* v. *Lord St. Leonards*[10] the Lord Chancellor's will was missing when he died at the age of 93. His daughter Charlotte claimed that she knew its contents by heart and dictated their substance to a solicitor from memory, but not word for word. The court accepted what she had said as a valid will.

The court will not, however, accept, as sufficient to establish the will, evidence of such isolated provisions as the witness can remember. These might misrepresent the testator's intention, as they may have been modified by other provisions of the will which have been forgotten.

iv. Exclusions from the Will. The Probate judge may order purely libellous or scandalous matter to be expunged from a will before publication[11] but not such matter as, whatever its character, is relevant to the interpretation of the will or to throw light on the testator's capacity or to explain why he has not provided for some dependant who would otherwise be able to claim against the will.[12]

B. Revocation of Grant of Probate

A grant of probate can be revoked if it transpires that there is a later valid will or that the will proved was for some reason invalid.[13]

[7] *e.g.*, *Wintle* v. *Nye* [1959] 1 W.L.R. 284.
[8] *In the Estate of Trotman* (1964) 108 S.J. 159.
[9] The presumption of revocation must be rebutted, *ante*, p. 447.
[10] (1876) 1 P.D. 154.
[11] *Re Horrocks* [1939] P. 198 at pp. 204, 208.
[12] *Practice Note* [1964] 1 W.L.R. 575.
[13] *In the goods of Byrne* (*No.* 2) (1910) 44 I.L.T. 192.

It can also be revoked if a mistake has been made about the identity of the executor or if he becomes insane or disappears before the estate has been fully administered.[14]

Where a grant is revoked, persons benefiting under the earlier will must return anything they have received, whether or not they knew about the later will and whether or not they have spent the amounts received by them.[15] On the other hand, persons acquiring assets in good faith and for value are protected,[16] and debtors of the estate are discharged if they paid the former executor.[17]

C. The Grant of Administration cum Testamento Annexo

If there is a valid will but no executor is named in it, or if all the executors predeceased the testator or renounced probate or died before obtaining probate, an application must be made for a grant *cum testamento annexo* by the same procedure as for probate. The priority right to a grant is based on the beneficial claims under the will, the residuary legatee having the first right, regardless of whether he receives less than some other legatee.[18]

D. The Grant De Bonis Non Administratis, etc.

If an executor dies intestate after probate a grant of administration *de bonis non administratis* must be applied for. The order of priority is like that for a grant *cum testamento annexo*.[19] If a sole executor is under age, application should be made, instead, for a grant during his minority.[20] If there is a dispute about the validity of the will an interim administrator *pendente lite* must be appointed to manage the estate until the court gives its decision.[21] If the executor or the person entitled to a grant *cum testamento annexo* is of unsound mind a special administrator must be appointed.[22]

E. Revocation of Administration

The various grants of administration just referred to may be revoked in similar circumstances to a revocation of probate and with the same effects.[23]

[14] *In the Estate of Galbraith* [1951] P. 442.
[15] *Ministry of Health* v. *Simpson* [1951] A.C. 251.
[16] A.E.A. 1925, ss. 36, 37.
[17] *Ibid.* s. 27.
[18] Non-Contentious Probate Rules 1954, r. 19.
[19] *In the Estate of Griffiths* [1917] P. 59.
[20] Non-Contentious Probate Rules, r. 31. The guardians are usually appointed.
[21] Judicature Act 1925, s. 163. Where the deceased was involved in a law suit an administrator *ad litem* can be appointed to conclude the proceedings, *e.g.*, *Re Haslip* [1958] 1 W.L.R. 583.
[22] Non-Contentious Probate Rules 1954, r. 33.
[23] Non-Contentious Probate Rules 1954, r. 42.

5. Capacity to Succeed as Legatee or Intestate Successor

A. Predecease of Legatee and Lapse of Legacy

i. General. The general rule, going back to Roman law, is that the successor must survive the testator or intestate.[24] Only a living person can own property or have title pass through him. The rule is strict and is not affected by a confirmation of the gift after the testator knows of the death of the legatee, or by a direction purporting to exclude the law of lapse from applying. A gift by will "to X and his successors" might logically seem to meet the problem but the traditional interpretation of such words is simply to give X an absolute, as distinct from a mere life, interest, and not to give the successors any rights as such. It is, however, possible to circumvent lapse by appropriate formulations, *e.g.*, "to X, or, if X be dead, to X's executors."[25]

ii. Exceptions to the Doctrine of Lapse. The doctrine of lapse may cause hardship where the legatee who predeceased the testator left a family who might otherwise have indirectly benefited from the gift and were probably meant by the testator to benefit from it. This has led to two statutory exceptions.

(a) *Entails.* Property subject to an entail will pass directly to the issue of the first tenant in tail if he predeceases the testator who created the entail but leaves issue.[26]

(b) *Wills Act 1837, s. 33.* The Legislature was less happy in its second attempt to alleviate the law of lapse. Where the original devisee or legatee fails to survive the testator but leaves issue who do survive the testator, the Wills Act 1837 makes the gift effective as if the devisee or legatee had died immediately after the testator.[27] There are two obvious difficulties here. In the first place, the second generation will not necessarily derive any benefit from this provision, although serving as a catalyst, since the parent-legatee may have made a will leaving his estate to some other person, and the latter will take the legacy as successor in title to the legatee.[28] In the second place the use of the fiction of survival rather than a simple direction against lapse has led to problems in the past in dealing with the chronology of events. However, the better opinion appears to be that the fiction will not be extended so as to change the actual order of deaths of the legatee and third persons.

[24] The same rule applies to corporations; *Re Servers of the Blind League* [1960] 2 All E.R. 298.
[25] *Re Greenwood* [1912] 1 Ch. 392.
[26] Wills Act 1837, s. 32.
[27] s. 33.
[28] *Re Pearson* [1920] 1 Ch. 247. In America state laws often pass the gift directly to the issue of the deceased legatee.

In *Re Basioli*,[29] the testatrix, Maria, made her will in 1923, leaving property to her daughter Adelina. Adelina died intestate in 1929, survived by an infant son. In 1939, Adelina's husband died, and in 1940, Maria died. Thus, Wills Act 1837, s. 33, would apply in the son's favour; but in 1949 he died intestate and still an infant. In the distribution of Adelina's estate, the question arose whether, in respect of the assets received from Maria, the persons entitled were to be ascertained as if she had died in 1929 or as if she had died immediately after Maria in 1940. Upjohn J. held that the persons entitled should be ascertained as at Adelina's death in 1929.

B. Attesting Witnesses Lose Legacies

The old law of wills held a will to be invalid if attested by a legatee, because a person claiming a benefit under a will was not regarded as a credible witness to its due execution. The Legislature contrived a rather unsatisfactory solution for this difficulty, which had resulted in many perfectly authentic wills failing.[30] It laid down that the will is good in such cases, but the legacy fails. The logic of this section is obscure; if the will is a true one, why should the legacy fail? If the will is a forgery why should any part of it be treated as good? The rigour of the rule has been alleviated by some exceptions; the gift remains good if any one of the testamentary documents containing the gift is attested by impartial witnesses, for example, a confirmatory codicil.

In *Re Trotter*[31] Charles Trotter by his will made in 1878 put a charging clause in his will in favour of John Trotter, who attested the will. In 1881 Charles executed a codicil attested by other witnesses and later in that year a second codicil, attested by John. It was held that John could rely on the charging clause since the first codicil did not rely on his attestation for its validity.

Again, the section forfeits gifts to a witness's spouse but this has been held not to apply to a case where the marriage occurred after the will was attested.[32] A signature of a witness has also in some cases been treated as if it had not been intended to be an attestation at all. However this was a rather dubious practice.

[29] [1953] Ch. 367. *Cf. Re Hensler* (1881) 19 Ch.D. 612, where a father was held not entitled to claim his property from a child who by a fiction had survived the father but left his property to the father by his will.
[30] Wills Act 1837, s. 15.
[31] [1899] 1 Ch. 764; so also if a witness attests separate sheets but not the sheet containing the legacy to him; *Re Craven* (1908) 99 L.T. 390.
[32] *Thorpe* v. *Bestwick* (1881) 6 Q.B.D. 311.

In the case of *Re Bravda*[33] a will was attested by several impartial witnesses but the testator then asked the legatees to sign the will, implying that this was connected with its validity. The court held that there was a strong presumption that a person signing a will did so as a witness and there was no evidence here to suggest any other reason for the signature. However the judges openly asked for the law to be reformed.[34]

The result of this case was the Wills Act 1968 which enacts that in respect of any death after May 30, 1968, the attestation of a witness may be disregarded if the will would have been duly attested without his signature. There must of course be at least two witnesses who are not themselves legatees as well.

C. Simultaneous Deaths: Commorientes

Legacies, as we have seen, fail if the legatee dies first. Gifts are also often made to some person on condition he survives some other person. In some cases it turns out to be impossible to prove in what order several persons died. This is especially true if they die in a common disaster such as a railway accident; but it can have a wider application, as where several persons have emigrated and been lost sight of. Since the burden of proof in a civil action falls on the plaintiff it was impossible for anyone to establish a claim in such cases.

In *Wing* v. *Angrave*[35] John Underwood made a gift by will to William Wing conditional on John's wife Mary predeceasing him. John and Mary and their three children emigrated by sea to Australia but they were washed overboard by a wave from the deck of the ship, which then sank. None of the victims could have survived for more than a few minutes in any case, but it could not be proved which died first. It was held that the will could not operate in favour of William as the burden of proof was not discharged. The crowning irony was that William, as it happened, would have taken the property under an alternative gift if the wife had survived the husband, but he was equally unable to prove that!

The Legislature eventually made a provision for this event, enacting that, where all proof as to the order of death fails, the

[33] [1968] 2 All E.R. 217.

[34] Many American state laws permit witnesses to take legacies if there are at least two witnesses who are not legatees.

[35] (1860) 8 H.L.C. 183, especially at pp. 218–220.

younger will in all cases be deemed to survive the elder.[36] The section does not, as is sometimes said, introduce a presumption of evidence but a rule of substantive law to cut the Gordian knot where evidence is lacking or inconclusive.[37]

D. Forfeiture of a Legacy where the Legatee Kills the De Cujus

No person who criminally kills a testator or intestate may receive property under the will or intestacy.[38] This is an old rule, without any statutory basis, and is intended to prevent a person benefiting from his crime. If there is a causal connection between the claimant's act and the death, he must prove that there was no crime.

> In *Re Pollock* [39] Mrs. Pollock made a will in 1924 leaving all her property to her husband. On June 11, 1940, the couple were found shot dead, and it was proved that the husband fired both shots. In the absence of evidence of the husband's state of mind he was presumed to have acted criminally. The wife's estate was administered as on intestacy, the husband being excluded.

The insanity of the killer will save the gift.[40] The courts have held that the name of the killer can be struck out of the will, so that if the estate is left to three children of the testator equally and one murders the testator, the other two share the whole estate, and the Crown does not take.[41] The rules on intestacy are the same as those of wills; if the intestate is survived by two children, one of whom is convicted of murdering the intestate, the other child will take the whole estate.[42]

The rule has always been stated so as to apply only where the killing is "felonious." The recent abrogation of procedural distinctions between felony and other crimes does not appear to have altered this rule, though it casts some doubt on it.[43]

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[36] L.P.A. 1925, s. 184; *Hickman* v. *Peacey* [1945] A.C. 304; Tiley, p. 418. The court can make a contrary order, but no one has ever suggested the grounds for such a step. See H. F. Jolowicz in *Festschrift Fritz Schulz*, 289.

[37] *Re Cohn* [1945] Ch. 5; *Re Bate* [1947] 2 All E.R. 418 states the principle inexactly.

[38] *e.g.*, *Re Dellow's W.T.* (1964) 108 S.J. 156, decided before the Suicide Act 1961.

[39] [1941] Ch. 219.

[40] *Re Pitts* [1931] 1 Ch. 546.

[41] *Re Peacock* [1957] Ch. 310; Tiley, p. 204; *cf. Re Robertson* (1963) 107 S.J. 318, where the court refused to strike out a reference to a killer in a condition not benefiting him.

[42] *Re Callaway* [1956] Ch. 559; Tiley, p. 201.

[43] Criminal Law Act 1967, s. 1.

6. The Law of Legacies and Devises

A. The Different Kinds of Legacies and Devises

i. Terminology. It is usual to refer to beneficial gifts of real property (freehold land) by will as devises, and to such gifts of other property as legacies or bequests. Devises are generally divided into specific and residuary, and legacies into specific, general, demonstrative and residuary. These various divisions correspond to important differences in their legal effects.

ii. Specific Devises and Legacies. These concern particular assets which exist at the time of the testator's death and are given by the will in such a way as to confer an equitable property right. At one time the devisee of land could claim the land against third parties, but at the present day a will passes no legal title directly to the devisee or legatee.[44] The executor is entitled to dispose of any asset to satisfy debts of the estate or otherwise in the course of administration, leaving the devisee or legatee the proceeds of sale, though these retain any special privileges or priorities belonging to the original assets.

In *Re Cohen*[45] Max Cohen appointed a bank and his wife his executors and left six houses to various devisees and the residue of his estate to his wife. The bank sold four of the six houses to pay his debts and claimed that the four gifts of these houses failed. Danckwerts J. disagreed. He said: "There is no doubt whatever that the executors were entitled, in the course of administration, to sell any of those properties, the proceeds of sale of which were required for the payment of the testator's debts, but there is another, and it seems to me, quite a distinct question . . . whether such liabilities ought to be treated as charged upon such respective properties . . . in the present case the beneficiaries ought to bear the burden of the debts which were taken out of the proceeds of sale of some only of the properties equally and rateably among them."

As a will operates from the date of the testator's death and not the date of its execution, there is no objection to a specific gift fluctuating in composition between the will and the death, provided it crystallises at the death. Thus a gift of the money in a specified bank account is a specific legacy of the credit balance in that account at the testator's death, although the balance may have varied during

[44] *Ante*, p. 93.
[45] [1960] Ch. 179 at pp. 188, 190; *cf. Re Birmingham* [1959] Ch. 523.

his life. The same is true of a bequest of "the horses in my stable," as these will be identifiable at the death.[46]

It is a common practice to list one's lands in a will and there is an old maxim that "all devises are specific." The courts tend to try to construe references to land as specific rather than residuary. Thus, if T had three houses in Oxford and left one to X under a specific description and then devised "my other houses in Oxford" to Y, the latter is a specific devise. A devise of "all my real property" has been treated as specific.[46a]

In *Re Wilson*,[47] however, this approach was criticised by Pennycuick J. who stated: "Apart from authority, the natural view, it seems to me, is that where a testator makes a general or universal gift of his real estate, that is, 'all my property' . . . that is . . . a residuary gift. A gift in this form does not indicate any particular item of property but covers all items of real property to which the testator may be entitled at his death . . . I do not think that . . . one should put such a construction on the words 'specifically devised' and 'residuary gift' as would in effect deprive the class of residuary gifts of realty of any possible content at all."

iii. General and Pecuniary Legacies. This is a gift of something which does not yet exist as an identifiable thing, but imposes a duty on the executor to provide the legatee with it. By far the commonest example is the pecuniary legacy, such as: "I leave £500 to A." Here no particular asset is referred to, and the estate as a whole stands charged with raising the sum. Legacies of shares with nominal values are treated in the same way. Where a testator owns certain shares but the will bequeathes shares without stating that these are the shares in question, the law leans towards construing the legacies as general.[48] A general legacy without any specific money valuation will normally fail for uncertainty; for example: "I leave a horse to X." A gift of "one of my horses" to X, on the other hand, is a specific gift, to be made certain by X's taking his pick of such horses as belong to the testator at the time of his death.

iv. Demonstrative Legacies. These are general legacies charged on a particular fund; for example: "£2,500 to X, payable out of my bank balance at Y Bank." Such a legacy remains payable if no such

[46] *Fontaine* v. *Tyler* (1821) 9 Price 94; *ante*, p. 157.

[46a] For the purpose of A.E.A. 1925, Sched. 1, Part II, para. 2. *Re Rowe* [1941] Ch. 343; *Re Ridley* [1950] Ch. 415.

[47] [1967] Ch. 53.

[48] Thus, in *Re Gage* [1934] Ch. 536, a gift of "£1,150 War Loan" was held to be general although the testator owned precisely that amount of War Loan at the time he made the will.

balance exists at the time of the testator's death, but enjoys preferential rights over it if it does. There is some analogy here to the position of a secured creditor, whose claim exists independently of the security but is privileged with respect to the security.

v. Residuary Legacies and Devises. As the name implies, these are gifts of everything not otherwise disposed of by the will. Every will should contain a residuary gift if a partial intestacy is to be avoided. No particular formula is required in order to constitute a residuary gift, provided the intention to create one is clear. The residuary legatee is a kind of general testamentary heir; he takes the benefit of all lapsed [49] and adeemed [50] gifts. On the other hand his interest is primarily liable for the testator's debts.[51] If he predeceases the testator the residue will pass on intestacy, unless some alternative disposition is made of it in the will.

B. Ademption

We have seen that the subject of a specific legacy or devise must exist at the time of the testator's death. If he leaves Blackacre to X by his will and then sells Blackacre, X has no claim to the proceeds of sale. The sale removes or "adeems" Blackacre from the testator's estate and to that extent revokes the specific devise. A contract or option to sell Blackacre will, if enforced, have the same effect.[52] Even a compulsory sale adeems a specific gift.[53]

There will be no ademption however where the asset in question has not been substantially changed, where for example shares are exactly subdivided into shares of a proportionately smaller nominal value.

> In *Re Clifford* [54] B, by his will executed in 1909, bequeathed twenty-three of the "shares belonging to me in the X Bank, Ltd." upon certain trusts. At that time B held 104 £80 shares. In August 1909 the X Bank merged with the Westminster Bank and each £80 share was divided into four new £20 shares. B continued to hold these new shares until he died in 1910. It was held that, although "belonging to me" referred to the original twenty-three shares, these shares still substantially existed and each original share was traceable in its four subdivided shares. The bequest was therefore a valid gift of ninety-two new shares.

49 *Ante*, p. 456.
50 *Infra*.
51 *Post*, p. 469.
52 *Re Rose* [1949] Ch. 78; *ante*, p. 137; *post*, p. 509.
53 *Re Galway's W.T.* [1950] Ch. 1. The Coal Act 1938 used the device of a fictitious contract of sale as the basis for the nationalisation of the collieries; *post*, p. 509.
54 [1912] 1 Ch. 29.

If the subject of a specific gift is destroyed or damaged, the legatee has no right to the insurance payment, as he is a stranger to the insurance contract.[55] The law does not presume any intention by the testator to restore such gifts, its approach being objective rather than subjective. Sometimes it will treat a codicil confirming a will as restoring a specific gift slightly altered in character since the date of the will.[56]

C. Abatement

If the extent of the testator's debts makes it impossible to honour all his legacies, his pecuniary legacies will have to be reduced, or "abated" to an equal extent proportionately (*pari passu*); each legatee will then receive a fraction of the amount stated in the will.[57] If all other assets are exhausted, specific gifts may also have to abate to meet debts, and for this purpose the asset is valued. All specific gifts abate *pari passu* also, each legatee getting the same fraction of the value of his original gift.[58]

7. The Law of Beneficial Intestate Succession

A. Total Intestacy

About half the population die without making a will. In many cases they have little property to leave, but in other cases they put off making wills or leave wills which are not in conformity with the law or have been revoked by their marriages without their realising it. Hence it is a big responsibility to distribute their estates fairly. Some legal systems have tried to decide scientifically the ideal form of division among relatives. Our present law is modelled on the statistically commonest provisions of English wills and is therefore based on free choice rather than logic.

Only the outline of the system of intestate succession can be given here. If a person dies without leaving a surviving spouse but leaving issue, the issue share the whole estate equally. If a person dies without issue, parents, brothers and sisters, nephews or nieces, the surviving spouse takes all.[59] If he leaves both a spouse and issue, the spouse takes all the household goods,[60] a first charge of £8,750 and a life interest in half the rest of the estate. If he leaves a spouse

[55] *Re Mercer* (1944) 60 T.L.R. 487.
[56] *Re Warren* [1932] 1 Ch. 42; Tiley, p. 214.
[57] *Re Whitehead* [1913] 2 Ch. 56.
[58] *Re Compton* [1914] 1 Ch. 119 at p. 122.
[59] A.E.A. 1925, s. 46, as amended by Intestates' Estates Act 1952, s. 1, and Family Provision Act 1966, s. 1.
[60] *Ibid.* ss. 46, 55.

and a parent, say, the spouse takes the household goods, a first charge of £30,000 and one half the residue absolutely.

Where issue take on intestacy, the second generation, under the doctrine of "representation," take the share a deceased parent of the first generation of issue would have taken. Thus if T, the testator, has two sons, A and B, and A survives him, but B predeceased T leaving five children, A will take one-half the estate and B's five children will take one-tenth of the estate each.[61]

Under the doctrine of "hotchpot"[62] or "account," issue must also notionally restore to the estate any substantial "advancement"[63] they have received from the intestate. Thus if a parent anticipates the eventual succession, by settling a sum on his child on marriage or on embarking upon a career, the child in question cannot claim against the estate on the parent's death without accounting for the sum advanced. This is done by adding the amount of this advancement to the value of the estate.

> In *Re Hayward*[64] F. C. Hayward died intestate in 1949 leaving an estate of £1,780. In 1946 he had nominated his elder son Frank to take £500 National Savings Certificates. These accordingly passed to Frank direct. It was argued that Frank should add these to the estate before it was divided between him and his younger brother. The result would be to make the estate £2,280. Frank would be entitled to £1,140 less the £500 already received, so he would now get £640 and his brother £1,140. The court held that there was no evidence that the gift of the £500 was made for any particular purpose, Frank having been already married and established in his work. Hence he could claim half the estate of £1,780, *i.e.*, £890.

B. Partial Intestacy

A testator may well die testate as to part of his estate and intestate as to other parts, as where his residuary legatee predeceases him but other legatees do not, or where his estate is left to A for life and then to B, and B dies before the testator. The law of wills is applied to the property disposed of by the will and the law of intestacy is applied to the rest.

Since the testator does not expect to die intestate as to any property, he will not have taken this into account, and the combination of his will and the law of intestate succession may therefore

[61] *Ibid.* s. 47. Issue take conditionally on marrying or attaining the age of majority.
[62] A.E.A. 1925, s. 47 (1) (iii).
[63] *Ante*, p. 358.
[64] [1957] Ch. 528, especially at p. 540; Tiley, p. 253.

unduly favour one of his beneficiaries. The law cannot alter the terms of his will but it can and does temper the effect of the intestacy law in such cases. Thus the surviving spouse must deduct from the first charge on intestacy the value of any benefits received under the will,[65] and issue must bring into account any such benefits when they claim on intestacy.[66] Where no statute otherwise provides, however, there is no duty to account, for example, in the case of a parent succeeding to a child.

8. Administration on Intestacy

A. The Grant of Administration

If a testator dies partially intestate, his executor will administer the whole estate, applying the rules of intestate succession to the part not disposed of by will. If, however, the testator died wholly intestate, *i.e.*, without leaving a will, there will be no executor named. It is, of course, possible to appoint an executor by will even without making any other disposition.

In *Re Skeats*[67] a testator used a printed will form on which he appointed his wife his executrix and directed his debts to be paid. He made no reference to the fate of his net estate, leaving a blank space after a provision reading "I give and bequeath . . . to." It was held that the widow held the property on trust for the intestate successors. Before 1830 executors took any residue not disposed of, but the repeal of the Executors Act of 1830 was held not to have restored that position.

If no executor is appointed and there is a total intestacy, an application must be made to the Probate Division for a grant of administration on intestacy (*ab intestato*). The priority of right to such a grant follows the law of succession, and the surviving spouse, if any, comes first, and then the children, and so on.[68]

At least two administrators must be appointed if any of the persons beneficially entitled is an infant or if a life interest is conferred by the intestacy law.[69]

An administrator, unlike an executor, must post a bond, in double the value of the estate, that he will administer the estate properly, and two sureties are generally required as well.[70]

[65] A.E.A. 1925, s. 49 (1), as amended.
[66] *Ibid.* s. 47; *Re Priest* [1944] Ch. 58.
[67] [1936] Ch. 683.
[68] Judicature Act 1925, s. 162.
[69] *Ibid.* s. 160.
[70] *Ibid.* s. 167.

B. Devolution of the Estate

In the first instance the legal estate, in a case of total intestacy, vests in the President of the Probate Division of the High Court, as once it did in the local bishop.[71] This is because the deceased can no longer own property and the law abhors a vacuum in the legal title. We do not regard the estate itself, as did the Romans, as a legal person.

The grant of administration vests the legal title in the administrator to whom it is made. Under the doctrine of retro-activity or "relation back" the administrator can sue for any harm done the estate before the date of the grant,[72] but he cannot take any proceedings before the grant is made.[73]

9. The System of Statutory Family Provision

Where a person dies and the effect of his will or of the law of intestacy is such that he has failed to make reasonable provision, in the circumstances, for his "dependants," they may apply to the Chancery Division (or, in the case of an ex-spouse, to the Divorce Division) for an order for payment of a lump sum or periodical sums.[74] An executor must take this possibility into account during the first six months after the grant of probate and an administrator during the first six months after his grant of administration.[75]

Whereas the surviving spouse is automatically entitled to be taken into consideration, a son is only so entitled if under age or incapable of earning a living, or a daughter if unmarried or unable to earn.[76] The court will not, however, make an order unless it considers that one is justified after considering all the circumstances, such as the applicant's other means and his or her treatment of the deceased, and the moral claims of the persons who take benefits under the will, if any.

Thus in *Re E.*[77] H married W in 1925 but left her in 1941. In 1943 H began living with X. In 1950 H conveyed his house to W. In 1956 W sued H for neglect but failed. In 1963 H died, leaving an estate of £1,000 to X, consisting mainly of a pension for his work since 1946. It was held that H had not acted unreasonably in leaving nothing to W. It was X who had looked

71 A.E.A. 1925, s. 9.
72 *Foster* v. *Bates* (1843) 12 M. & W. 226.
73 *Hilton* v. *Sutton Steam Laundry* [1946] K.B. 65.
74 Inheritance (Family Provision) Act 1938, as amended 1952 and 1966.
75 *Ibid.* s. 2; the time may be extended.
76 *Ibid.* s. 1.
77 [1966] 1 W.L.R. 709.

after H while he earned the right to his pension, and X had given him three children.

A widower is under no particular legal disadvantage as compared with a widow, but the cases in which he will obtain an order are not likely to be frequent so long as our society regards the husband as the primary breadwinner.[78]

Since 1958 a former spouse is entitled to apply for provision out of an estate.[79] It does not, however, follow that a person is under quite as strong an obligation to provide for a former spouse, especially as the decedent may have a new wife and family to support. If the applicant was the guilty party in a divorce case the court is also unlikely to make an order.

The discretion of the court under the Acts can probably not be fettered by agreements entered into between husband and wife. There is no English decision establishing this proposition,[80] except in proceedings brought by a divorced wife under the Matrimonial Causes Act 1965, ss. 26, 27 and 28. But the same principle should be applied in all cases.

In *Re Minter*[81] Mrs. Minter was a party in 1962 to a court consent order awarding her £12,000 on her express undertaking not to make any further claim against her husband *or his estate*. Her husband died in 1966. Mrs. Minter then claimed that he had concealed some of his assets at the time of the 1962 order. The court held that it had jurisdiction to entertain her application for provision in spite of the court order, and in any case the allegation of fraud entitled them to look into the matter.

The court order under the Acts may be varied from time to time in the light of changed circumstances. To a certain extent it may also look at changes occurring between the death and the application before making the original order.[82]

One of the drawbacks of the system is that it only applies to the "net estate" of the deceased after all obligations to creditors are met, so the testator can frustrate the law by entering into gratuitous contracts under seal, binding his estate to make payments which

[78] *Re Clayton* [1966] 1 W.L.R. 969.
[79] Matrimonial Causes Act 1965, s. 26 (as amended in 1966).
[80] In *Zamet* v. *Hyman* [1961] 1 W.L.R. 1442, an agreement purporting to exclude the right to apply under the Act was struck down by the Court of Appeal on the ground of undue influence. See also *Parish* v. *Parish* [1924] N.Z.L.R. 307; *Leiberman* v. *Morris* (1964) 69 C.L.R. 69; *Re Chugg* (1966) 52 D.L.R. 2d 458.
[81] [1967] 3 All E.R. 412.
[82] Inheritance (Family Provision) Act 1938, s. 1; *Re Clarke* [1968] 1 W.L.R. 415; *Re Goodwin* [1969] Ch. 283.

will exhaust it.[83] Another drawback is the need to go to law in every case, requiring an examination in detail of family circumstances, over a long prior period, rather than awarding a predictable fraction of the estate or a fixed sum, as is often done abroad. However, a body of case law is developing and no doubt the rules for the exercise of the court's discretion will in time become as certain and familiar as those of other branches of equity.

10. The Administration of the Estate

A. Power of Disposition of the Assets

English law is marked by the conferment on personal representatives of very wide powers of dealing with assets, in the interests of the prompt and efficient winding up of estates. Land is held by them on trust for sale or with the powers of trustees for sale.[84] We have seen [85] that personal representatives may dispose of assets specifically bequeathed, if more convenient to do so.[86] The bona fide purchaser is not concerned to ascertain whether any disposition was in fact required.[87] Personal representatives also have power to lease [88] and a limited power to mortgage.[89] They cannot generally purchase the assets themselves or renew leases for their own benefit.[90] The court may extend the powers of personal representatives if proper to do so.[91]

B. Payment of Debts of Insolvent Estates

If a testator's or intestate's debts exceed the value of his assets the estate is insolvent and all beneficial dispositions fail. The sole task of the personal representative is to apply the assets according to the priority of the various claims. Funeral, testamentary and administrative expenses enjoy highest priority.[92] Other debts are classified according to the general bankruptcy rules; preferred debts include a year's rates and taxes and four months' arrears of employees' salaries [93]; next come ordinary debts, arising from contracts and

83 Inheritance (Family Provision) Act 1938, ss. 1, 5; *cp.* Matrimonial Causes Act 1965, s. 32, which prevents a husband disposing of property to defeat a wife's claim to support in his lifetime.
84 A.E.A. 1925, ss. 33, 39.
85 *Ante*, p. 460.
86 A.E.A. 1925, s. 2 (1); *Re Cohen* [1960] Ch. 179.
87 T.A. 1925, ss. 14, 17; A.E.A. 1925, s. 36 (8).
88 A.E.A. 1925, s. 2 (1); S.L.A. 1925, s. 41.
89 A.E.A., s. 39 (1) (i); S.L.A., s. 71. As to the power to carry on the testator's business, see the 8th edition of this work, pp. 502–505; *Williams on Executors and Administrators* (14th ed.), p. 1052 *et seq.*
90 *Re Llewellin's W.T.* [1949] Ch. 225; *Holder* v. *Holder* [1968] Ch. 353.
91 T.A. 1925, s. 57; S.L.A. 1925, s. 64; *ante*, pp. 383, 384.
92 A.E.A. 1925, s. 34 (1), Sched. I, Pt. I.
93 Bankruptcy Act 1914, s. 33; Companies Act 1948, s. 319.

some torts, and finally the deferred debts like loans between spouses. If debts of a class cannot be paid in full, each debt is reduced proportionately.

Those rules of bankruptcy law which allow the automatic recovery, in favour of the creditors, of property settled by the bankrupt do not apply on death,[94] but a settlement by a deceased person at a time when he was insolvent can be set aside and the assets recovered as having been disposed of in fraud of creditors.[95]

Personal representatives still enjoy an anomalous power to prefer one creditor in a class to another, paying him in full and paying the other nothing, and an anomalous right of retainer in the case of an executor who is also a creditor of the estate. These powers are inconsistent with the modern principle of applying the bankruptcy rules where all creditors of a class are paid proportionately. The power of retainer cannot be exercised to the detriment of a debt of a higher class.

> In *Att.-Gen.* v. *Jackson*[96] the testator left an estate worth £1,000, owing the Crown £3,000 arrears of income tax, of which one assessment alone was for £2,000. The executrix purported to retain the £1,000 to discharge a debt of that amount owed her by the testator. The House of Lords held that, although the priority of various debts had been altered by the 1925 legislation, the principle that you cannot retain in respect of an inferior debt against a superior debt survived and had to be applied to the new classification of debts.

C. Payment of Debts out of Solvent Estates

Creditors are, of course, paid in full before any beneficiaries receive anything. A testator may leave sufficient assets to meet all his debts and some but not all of his legacies. The selection of the assets to be applied in payment of debts will affect the availability of assets for the payment of particular legacies.[97] Before 1926, debts were generally paid out of the residuary estate, which was then used to meet pecuniary legacies. The post-1925 system is broadly similar but much more complicated.[98] Debts are first paid out of assets not effectively disposed of by the will, if any, and then out of assets passing under a residuary gift in the will. Assets specifically devised or bequeathed are notionally set aside and not

[94] Bankruptcy Act 1914, s. 42; *ante*, p. 247 *et seq.*
[95] L.P.A. 1925, s. 172; *Re Eichholz* [1959] Ch. 708; *ante*, p. 246.
[96] [1932] A.C. 365; *cf. Re S.P.* [1936] Ch. 735.
[97] This question does not arise in connection with distribution on intestacy for the statutory system of intestate succession provides for the order in which claimants are paid out of the net estate.
[98] A.E.A. 1925, s. 34, Sched. I, Pt. II.

used for the payment of debts except in the last resort. The testator may vary the statutory order of applying the assets in payment of debts.[99] There is a mass of unsatisfactory and contradictory case-law on this subject, under which the court seizes on various expressions in wills as indications of contrary intention when it is unlikely the testator had any clear intention; thus if he instructs his executor to pay his debts first (which the law would in any case require) and then to pay his legatees, the statement is treated as throwing the debts on to the gross estate, and negativing the primary liability of property undisposed of by will.[1]

Where a particular asset was charged with a debt or liability before the testator died, as where his house was subject to a mortgage or where he still owed the vendor the purchase money, the person taking the asset under the will must bear the charge himself.[2] The testator may, however, expressly provide in the will that the asset is to be exonerated and the payment made in another way.

> In *Re Fegan*[3] Richard Fegan left certain property on trust for sale, the proceeds to be used to pay his debts. The will went on to leave the proceeds of certain insurance policies to his children. The policies were worth £4,000 but subject to a £2,000 mortgage. It was held that the children could insist on the mortgage being paid off out of the special fund provided for the purpose, so far as it would go.

Where a testator by his will charges a debt on some asset, or directs its payment out of some assets, however, this rule does not invariably apply, since Part II of the First Schedule to the Administration of Estates Act 1925 itself places such assets in a more privileged position than undisposed-of property or residuary property, apparently because such express charging had become traditional before 1926 when the liability of property for debts was different.[4] An intention to exonerate other assets must appear.

D. Liability of Assets to Raise Pecuniary Legacies

Pecuniary legacies are directions by the testator to pay named amounts at the expense of his estate. Undisposed-of property is the primary fund for these.[5] Formerly, residuary personalty was the

99 *Ibid.* Sched. I, Part II, para. 8 (a).
1 *Re Berrey's W.T.* [1959] 1 W.L.R. 30; *Re Eleanor Taylor's Estate and W.T.* [1969] 1 All E.R. 113.
2 A.E.A. 1925, s. 35, following older legislation and applying it to all forms of property.
3 [1928] Ch. 45.
4 A.E.A. 1925, s. 34.
5 *Re Martin* [1955] Ch. 698; this includes land passing on intestacy and converted into money by A.E.A. 1925, s. 33.

next appropriate fund and the courts tend to throw this liability on to it today although the wording of the statute suggests that residuary realty was equally meant to be liable.

In *Re Wilson* [6] a testator gave legacies totalling £27,000 and left all his real property and the residue of his personal property to his daughter. It was held that legacies should be paid out of the personal estate and the debts thrown on to the real estate. The First Schedule to the Administration of Estates Act 1925 directs a sufficient fund to pay legacies to be taken out of the (solvent) residuary estate before the residue is used to pay debts, and legacies have not generally been chargeable against real property. Had the devise of all real property been construed as a specific devise in this case, all the debts would have been thrown on to the personal estate and the legacies would have failed.

E. Distribution of the Net Estate

After all debts and duties are paid the personal representatives must distribute the net estate among the claimants. In many cases this will merely mean making out a cheque for the amount of a legacy or handing over an object like a watch or ring, or permitting a person to retain articles in his or her possession, as, for example, where the widow is already using furniture which passes to her on the death. If some asset is of such a nature as to require a particular form of transfer, this must be used; in the case of shares in a company a share transfer is necessary.

In the case of land, freehold or leasehold, the question of later proof of title arises, and here the personal representatives must execute an assent in order to vest the legal estate in the devisee, legatee or intestate successor entitled to it. The "assent" was originally a formality, introduced to show that a devisee of land might keep it free of further claims by the personal representatives on behalf of creditors. Since 1897 the legal estate in freehold land passes to the executor or administrator, as does the title to all other property.[7] Hence the "assent" is now a true conveyance of the legal title, showing the passing of the estate from the deceased through the personal representative to the successor.

Persons dealing with a beneficiary under a will or a person entitled on intestacy are not generally concerned with the provisions of the will, if any, or with the entitlement of the person in whose

[6] [1967] Ch. 53; Tiley, p. 187.
[7] A.E.A. 1925, s. 36.

favour an assent is made. However, the assent is not always conclusive.

> In *Re Duce and Boots Contract*[8] a testator George left his daughter Sophia a house, if she wished to live in it, for life, and £1 10s a week. She released the claim to the money but never released her claim to the house. Her brother George Edward, the executor, assented to the house vesting in himself, and the assent, quite improperly, recited the terms of the will. It was held that a purchaser could refuse to take title from George Edward as there was a clear indication on the title of the error.

A person in whose favour an assent is made by a personal representative may require that notice of the assent be indorsed on the probate or letters of administration[9]; and such indorsement is effective to give notice to later purchasers.[10] If there is no such indorsement, a purchaser is entitled to rely upon a statement in writing by a personal representative that he has not given or made an assent or conveyance in respect of the legal estate. But this is without prejudice to any previous disposition in favour of another purchaser by the personal representative.[10]

Since the assent now transfers the legal title to the property therein referred to, the question arises whether an executor or administrator, who is beneficially entitled to land, is required to execute an assent in his own favour, since the legal title is already vested in him as personal representative. The use of a formal assent is obviously convenient, since, if the land is subsequently retransferred, the purchaser would otherwise have no means of knowing whether the personal representative was beneficially entitled to it or not, nor whether the personal representative was acting as such or as beneficial owner when he resold.[11] However, it is equally inconvenient to insist on such an assent if the personal representative has died without making one, and therefore the law will generally imply here that he made an "assent" to himself. In the same way, if the testator appoints the same persons executors of his will and trustees of the net estate after administration, the law may imply an assent by them in their own favour if they have begun to perform the ultimate trusts. Doubt, however, is cast upon cases so holding[12] by the recent case of

[8] [1937] Ch. 642; under A.E.A. 1925, s. 36 (7), which refers to the assent as sufficient (but not conclusive) proof that it is lawful; *ante*, p. 92.
[9] A.E.A. 1925, s. 36 (5).
[10] *Ibid.* s. 36 (6).
[11] *Re Hodge* [1940] Ch. 260.
[12] *Re Ponder* [1921] 2 Ch. 59; *Re Cockburn's W.T.* [1957] Ch. 438.

Re King's Will Trusts,[13] which requires an assent by a personal representative in all cases.

Specific gifts which are income-bearing, such as devises of land leased at rents, entitle the legatee to the income from the date of the testator's death, unless the testator has made some other disposition of it for some period of time.[14] The same applies to contingent gifts.[14a] Correspondingly, the legatees are liable for any expenses connected with the property devised or bequeathed.[14b]

Residuary gifts, whether vested or contingent, carry any income of the estate not otherwise disposed of, unless a contrary intention appears.[14c]

Pecuniary legacies generally carry interest from the expiration of the "executor's year."[14d] Interest will run from the time of the testator's death, however, if the legacy is made to the testator's infant child, in order to provide income for its support.[14e] Contingent pecuniary legacies carry no interest at all, except where given to the testator's infant child,[15] including an infant to whom the testator has placed himself *in loco parentis*.

If a specific gift is made by will, it will not carry interest accrued due before the testator's death; for example, if a dividend is declared on shares after the death, but in respect of a period before the death, the dividend will form part of the capital of testator's estate.[15a]

Debts are also generally payable at the end of the executor's year. They are therefore treated as paid out of capital plus one year's interest on capital, both capital and interest making a contribution. The tenant for life under a settlement of the residuary estate will therefore not be entitled to the full income on the gross capital but will suffer a small deduction.[15b]

The apportionment of income of wasting assets forming part of residuary personal estate settled on persons in succession has been dealt with in connection with the administration of trusts.[15c]

[13] [1964] Ch. 542; *ante*, p. 93.
[14] *Re McGeorge* [1963] Ch. 544.
[14a] L.P.A. 1925, s. 175; *Re Hatfeild's W.T.* [1958] Ch. 469.
[14b] *Cf. Re Day's W.T.* [1962] 1 W.L.R. 1419 where damages due by the testator for failure to repair property under a lease were held to be ordinary debts of the estate.
[14c] L.P.A. 1925, s. 175; *Berry* v. *Green* [1938] A.C. 575.
[14d] A.E.A. 1925, s. 44; *Re Pollock* [1943] Ch. 338.
[14e] *Re Stokes* [1928] Ch. 716.
[15] *Re Abrahams* [1911] 1 Ch. 108.
[15a] *Re Winder's W.T.* [1951] Ch. 916.
[15b] *Allhusen* v. *Whittell* (1867) L.R. 4 Eq. 295; the rule also applies to deferred debts payable at later dates and to annuities; *Re Perkins* [1907] 2 Ch. 596, recently applied in *Re Earl of Berkeley* [1968] Ch. 744.
[15c] *Ante*, p. 336.

F. Wrongful Payments

i. Liability of Personal Representatives. The liability of personal representatives for "*devastavit*," though much more ancient than the liability of trustees for breach of trust, has tended to become closely related to it, and need not therefore be discussed in much detail.

(a) *Devastavit.* A *devastavit* is loss of assets of the estate. Liability can arise, for example, through fraudulent conversion of property of the estate, losing capital by speculative investment, or through carelessly losing assets; the personal representative need not be personally at fault, as where payments are made by mistake of law.[15d] One peculiar feature of the law of administration of estates is the duty to pay debts in the correct order, but here the personal representatives are protected against debts or beneficial claims of which they had no notice, if they advertised for claims and waited at least two months for them to be presented.[15e] The main differences between trustees and personal representatives have been discussed earlier.[16]

(b) *Limitation Act 1939.* Creditors of the estate must sue within six years of the close of administration.[17] Beneficiaries have twelve years in which to sue,[18] but this is reduced to six years if the representatives have become trustees by completing their administration.

> In *Re Timmis*[19] the testator gave to his niece a life interest in a fund of personalty with a gift over to her children. The executors, who were also named trustees, paid the share over to the niece absolutely. The niece's child sued more than six but less than twelve years later, and failed.

There is, however, no period of time applicable to a personal representative who has in his possession assets of the estate, or has converted them to his own use, or has been guilty of fraud.[20]

ii. Suit by Unpaid or Underpaid Legatees. It has been seen that a personal representative may, subject to express protection given to him by statute or by the will, be liable for paying away assets to the wrong person. His right of recovery is apparently limited to that of a quasi-contractual claim, which will succeed if the property was

[15d] *Ministry of Health* v. *Simpson* [1951] A.C. 251; *sub nom. Re Diplock* [1948] Ch. 465; *post*, p. 475.
[15e] T.A. 1925, s. 27; *ante*, p. 326.
[16] *Ante*, p. 91.
[17] Limitation Act 1939, s. 2.
[18] *Ibid.* ss. 4 (3), 7 (1), 20; *ante*, p. 412.
[19] [1902] 1 Ch. 176.
[20] Limitation Act 1939, s. 19 (1); *ante*, p. 411.

paid through the defendant's fraud or duress or through mistake of fact; but not where it was due to mistake of law.[21]

The question then arises whether the person properly entitled may proceed against the person wrongly paid. It will be remembered that in *Re Diplock*[22] large sums of money were paid to various hospitals in the belief that the will had disposed of the property upon charitable trusts. When the trusts were held void,[23] the next-of-kin took proceedings against the executors and against the hospitals. Their claim to trace such property as was identifiable in the hands of the hospitals has been discussed.[24] They succeeded also in a personal claim both against the executors and against the hospitals. The personal claim, but not the proprietary one, went on appeal to the House of Lords, where the appeal was dismissed.

The personal claim is available to a creditor or underpaid legatee,[25] but only after the claimant has first exhausted his remedy against the executor who made the wrongful payment.[26] The remedy is not restricted to cases in which the estate is being administered by the court.[27] Nor does it matter that the mistake was one of law.[28] It is no defence to such an action that the defendant received the money in good faith without knowledge of the flaw in the title[29]; there is, in other words, no defence of change of position.[30] The action is a claim "to the personal estate of a deceased person," and the period of limitation applicable to it is therefore twelve years.[31]

[21] *Ministry of Health* v. *Simpson* [1951] A.C. 251; *sub nom. Re Diplock* [1948] Ch. 465.
[22] [1948] Ch. 465; Tiley, p. 349; and see *Ministry of Health* v. *Simpson*, *supra*; *ante*, p. 422.
[23] *Chichester Diocesan Fund* v. *Simpson* [1944] A.C. 341; Nathan & Marshall, No. 51.
[24] *Ante*, pp. 421–424.
[25] *Noell* v. *Robinson* (1686) 1 Vern. 90; *Harrison* v. *Kirk* [1904] A.C. 1, 7; *David* v. *Frowd* (1833) Myl. & K. 200; *Peterson* v. *Peterson* (1866) L.R. 3 Eq. 111; *Re Rivers* [1920] 1 Ch. 320.
[26] *Orr* v. *Kaines* (1750) 2 Ves.Sen. 194.
[27] *Ministry of Health* v. *Simpson* [1951] A.C. 251 at p. 268.
[28] No such right applies to underpaid beneficiaries in the case of a trust fund. Such a claim is a common law quasi-contractual claim: *Ministry of Health* v. *Simpson*, *supra*.
[29] [1951] A.C. 276.
[30] *Ante*, p. 429; Goff & Jones, Chap. 42; (1957) 73 L.Q.R. 48 (G. H. Jones).
[31] Limitation Act 1939, s. 20.

CHAPTER 24

ELECTION

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1. INTRODUCTION

THE principle from which the doctrine of election derives is old, basic and wide: a person may not take a benefit and reject an associated burden or, to put it in another way, a person may not choose between parts of a single transaction: *qui sentit commodum, sentire debet et onus.*[1] At the beginning of the eighteenth century this principle appears in a distinct form: a volunteer taking under a will must give effect, so far as he is able, to everything contained in the will. But in this form the principle is extended from wills to deeds and, by the end of the century, it is at the root of a wide variety of cases. Cases of excessive execution of a power, ineffective disposition of realty, and dispositions in conflict with a spouse's right such as dower are among the most common. Such cases may lead to an election, in this sense: the disappointed beneficiaries may be to some extent compensated by making those who do take under the instrument elect between their rights. T attempts to give property over which A has rights to B absolutely, and as part of the same transaction gives other property to A. A cannot take the latter without giving effect to the former.

In the first half of the nineteenth century the cases change. The right of alienation is less restricted, and forms of alienation less complicated. The principle of election comes to be associated more with cases where a testator has made a mistake than where he has made an eccentric or ineffective disposition. Election becomes formulated as a doctrine, in the light of these changes. It becomes

[1] For recent appearances of this principle, see *Halsall* v. *Brizell* [1957] Ch. 169; *Ives (E. R.) Investment* v. *High* [1967] 2 Q.B. 379; Tiley, p. 175; and *Annual Survey of Commonwealth Law* [1965] p. 313 *et seq.* (A. W. B. Simpson).

established that election leads to compensation not to forfeiture, that an actual intent to cause an election need not be shown, and that parol evidence is not admissible to explain the disposition. The doctrine becomes technical and refined, and an uncertain instrument of equity in the broad sense. A supportable basis for the doctrine in its developed form is, as will be apparent, hard to find.

In considering the present-day doctrine of election, then, we must remember three things: first, that we have a basic idea enshrined in a technical doctrine, secondly, that the basic idea has continued to have applications that are analogous to the technical doctrine but not part of it,[2] and, thirdly, that some parts of the technical doctrine are anomalous in that they inherit reasoning from the doctrine's earlier days.

A good modern statement of the doctrine is given by Jenkins L.J.[3] "The essentials of election are that there should be an intention on the part of the testator or testatrix to dispose of certain property; secondly, that the property should not in fact be the testator's or testatrix's own property; and, thirdly, that a benefit should be given by the will to the true owner of the property." This statement of the doctrine will need careful consideration, but first an example may be helpful. (The letters in this example will be used throughout the chapter.) A is owner of Blackacre. T in his will devises Blackacre to B and bequeaths £10,000 to A. A is put to his election. This means that he can choose to take with the will or against the will. If A takes with the will, he will release Blackacre to B and get his £10,000. If A takes against the will, he will retain Blackacre but the £10,000 will be subject to an equity in B to claim compensation out of it to the extent of the value of Blackacre. If Blackacre is worth £12,000, B will take the £10,000. If Blackacre is worth £6,000, B will take that much and A £4,000.

It is absolutely essential in the above example that the legacy to A should not have been *expressed* to be conditional upon A releasing Blackacre to B. If a condition attached to a legacy is not complied with, the legatee loses the legacy altogether, which falls into residue. It is not just a matter between A and B. Accordingly it is not a question of A electing between forms of benefit. If he does not comply with the conditions, he gets nothing, B gets nothing, and the residuary beneficiary takes the legacy.[4]

[2] *e.g.*, *Guthrie* v. *Walrond* (1883) 22 Ch.D. 573; *Codrington* v. *Codrington* (1875) L.R. 7 H.L. 854.

[3] *Re Edwards* [1958] Ch. 168 at p. 175; the doctrine is not, of course, confined to wills.

[4] This principle was always true of conditional gifts. The early cases on election talk of an election arising on an implied condition: *Noys* v. *Mordaunt* (1706) 2 Vern. 581. But it was finally held by Lord Eldon that election did not give

2. Requirements for Election

A. The Intent to Dispose of Property

In this section only intent will be discussed. Jenkins L.J., in the passage already quoted, talks of the intent as being to "dispose of certain property"; not to "dispose of another's property." This distinction goes to the heart of the matter. The courts do not examine the state of a testator's knowledge. The question is—does the will purport to dispose of property? Was that property the testator's to dispose of? That the testator did or did not realise that the property was or was not his to dispose of is irrelevant. The testator is presumed to know what his interest is in property that he is devising. External evidence is not (though evidence *in* the will of course is) admissible to raise or rebut an election.[5] The equity of election arises because of the very co-existence of two particular gifts in the same instrument, and not because of any "conjecture of a presumed intention"[6] that equity makes about them. This was clearly put by Lord O'Hagan[7]: "But what is the intention that the Court must apprehend upon clear evidence? Not an intention on the part of the testatrix that there shall be an election. . . . A . . . testatrix does not generally know or understand anything about the doctrine of election. . . . The intention that must be clearly demonstrated in evidence to the Court, is an intention to do the particular thing—to give the property which the party has not a right to give, and to give a benefit to a person who has an interest in the property. Those two intentions being ascertained upon clear evidence, the law draws the conclusion. It is a conclusion of equity, . . . and there is an end of the matter."

The first requirement of election is therefore that it should appear from the will itself that the testator was purporting to dispose of property which was not in fact his to dispose of. But if this does so appear, then the requirement is satisfied though the testator may very well not have understood the position—as, indeed, in many cases of election he will not have done. In a recent case, a testator was presumed to know that property he was purporting to dispose of absolutely in his will was subject to the rights of his wife under

rise to forfeiture: *Tibbits* v. *Tibbits* (1821) Jac. 317; and see Swanston's note at (1818) 1 Swan. 409. Thereafter it became more and more difficult to base election on intent or to use the language of implied conditions with any accuracy: see Lord St. Leonards in *Sugden on Powers* (8th ed.), p. 576.

[5] This rule became firmly established in the first half of the nineteenth century: *Dummer* v. *Pitcher* (1833) 2 Myl. & K. 262; *Clementson* v. *Gandy* (1836) 1 Keen 309; *Parker* v. *Sowerby* (1854) 4 De G.M. & G. 321.

[6] *Per* Lord Cairns L.C. in *Cooper* v. *Cooper* (1874) L.R. 7 H.L. 53 at p. 67.

[7] *Cooper* v. *Cooper*, *supra*, at pp. 74–75.

Danish matrimonial law, though it was reasonably evident that it was just this that he had forgotten.[8]

Two considerations limit this strictness of construction, however. First, a disposition will not, as a matter of the construction of the will, be construed as including another's property if it has a sensible effect when construed in some other way. A gift in general terms, of residue for instance, will only exceptionally raise an election,[9] and the will of a testator who has a limited interest in property will only be construed as disposing of a larger interest in that property if, for instance by the use of clear words of limitation, the latter construction is the only reasonable one.[10] Secondly, though election operates on the facts as existing at a testator's death, a further look is permitted to ascertain whether a legacy appearing to dispose of another's property has ceased to be operative by reason of an ademption. Thus no election will arise if T, having devised Blackacre to B and other property to A, subsequently sells Blackacre to A and dies without changing his will; for the sale adeemed the legacy, which thereupon became inoperative.[11]

B. The Property of Another that is Disposed of

The basic idea here is simple. It is sufficient if a testator is purporting to dispose of an interest in property that is in fact another's. In illustrating the requirement, however, the more complicated case of testamentary powers of appointment is taken, as many of the cases arise in that context.

T has power to appoint by will among the children of Z, the property to go to such children in default of appointment. T appoints half of the property to A, a child of Z, and the other half to B, a stranger. T also devises Greenacre to A. A will be put to his election. But the reason is not because T made an appointment of half of the property to A, but because A was entitled in default of appointment. Only the latter counts as A's prior property for the purpose of the doctrine of election.

i. Property Must be Alienable. The property of A that T purports to dispose of must be alienable by A. If it is not alienable, A has not to elect. He has no choice in the matter and election presupposes a choice. In such a case A takes his gift under the

[8] *Re Mengel's W.T.* [1962] Ch. 791.
[9] *Dummer* v. *Pitcher* (1833) 2 Myl. & K. 262; *Re Harris* [1909] 2 Ch. 206. One such exceptional case, involving community of property under foreign law, is *Re Allen* [1945] 2 All E.R. 264.
[10] *Parker* v. *Sowerby* (1854) 4 De G.M. & G. 321; *Wintour* v. *Clifton* (1856) 8 De G.M. & G. 641.
[11] *Re Edwards* [1958] Ch. 168, *ante*, p. 462.

will without any obligation attaching to it.[12] An election does arise, however, where A is not absolute owner but has only a limited interest in the property which T has purported to dispose of absolutely.

> In *Re Dicey*,[13] T devised property to A, and purported to dispose of the entire interest in other property to B, which property was in fact owned (on T's death) as to a half-share by A, and as to a quarter-share each by B and by C. The Court of Appeal held that A must elect and that, on an election to take with the will, the equity of election is satisfied by his release of his property to B so far as he is able; a release of his half-share to B thus making B owner as to a three-quarter share.

This may not be what T intended, but the doctrine depends neither on this consideration nor on the existence of an outstanding interest in another party. The principle of *Re Lord Chesham* [12] accordingly applies only where A cannot by any "relevant means" bring about anything resembling the result envisaged by the will.[14]

ii. Void Disposition. A more difficult problem arises if T's purported disposition of A's property to B is bad for a reason quite independent of it being A's property, for instance through informality, or the rule against perpetuities. Is A in such a case put to his election between the property purported to be given to B and the benefits given him by T's will? It is tempting to argue that a disposition that is legally bad is non-existent for all purposes. Indeed Lord Hardwicke seems to have argued this way.[15] But a century later it is clear that the judges are unwilling to draw a distinction, for the purposes of the doctrine of election, between mistakes of fact and law, and between grounds of voidness.[16] Save where "illegality" is involved, A is put to his election; in particular, an infringement of the rule against perpetuities is held not to be a

[12] *Re Lord Chesham* (1886) 31 Ch.D. 466; Tiley, p. 292 (a legatee who had no power of alienation of family heirlooms). The decision was not based on the intent, presumed or otherwise, of the testator.

[13] [1957] Ch. 145. Where several persons are called upon to elect (*e.g.*, joint owners) each has an independent right to elect: *Fytche* v. *Fytche* (1868) 7 Eq. 494.

[14] Envisaged by the will, rather than the testator. This statement of the rule is based on a passage in *Re Dicey*, *supra*, at p. 158, which distinguishes two cases involving foreign systems of law: *Re Ogilvie* [1918] 1 Ch. 492; *Brown* v. *Gregson* [1920] A.C. 860. The flexibility of "relevant means" is necessary for such cases.

[15] *Hearle* v. *Greenbank* (1749) 3 Atk. 695 at p. 715. *Cf.* Pearson J. in *Re Warren's Trusts* (1884) 26 Ch.D. 208 at p. 219. This is also the reasoning in *Woolridge* v. *Woolridge*, *post*, p. 481, but this decision is to be supported, if at all, on another ground.

[16] *e.g.*, Page-Wood V.-C. in *Schroder* v. *Schroder* (1854) 23 L.J.Ch. 916 at p. 918.

special ground of invalidity, demanding separate treatment.[17] Subsequently, however, the judges have varied in their views in this one instance of the rule against perpetuities. In *Re Oliver's Settlement*,[18] an infringement of the perpetuity rule was said to be "illegal," so that equity would not, through causing an election, help to effectuate it. And this view was upheld by the Court of Appeal in *Re Nash*,[19] which purported to overrule the decision of Kekewich J. in *Re Bradshaw*[20] that A was put to his election in this type of case. Nevertheless, Younger J. in *Re Ogilvie*[21] did not regard the matter as finally established and the weight of academic opinion is in favour of an election arising.[22] For A, in being put to his election, is not asked to do more than *he* legally can; no perpetuity will attach to the manner in which A releases his property to B.[23] This may not produce all that T intended but, as we saw from *Re Dicey*,[24] that is no reason for avoiding an election.

iii. Appointment to Object with Proviso in Favour of Non-Object. A rather special group of cases, involving powers of appointment, must now be mentioned. If T, in making a valid appointment in A's favour, superadds some proviso in favour of B, there is no election. The rule here is simply to ignore the proviso, so that A takes the property validly appointed to him free from any obligation, together with any property to which he is entitled in default of appointment and any other property given him by T in his will.[25] The proviso is not treated as a purported gift of A's property but as non-existent.[26] But in terms of the doctrine of election, it is anomalous that this particular attempt to provide a benefit for B at A's expense should not put A to his election.[27]

iv. A's Title Independent of Instrument Raising Question of Election. A far more important rule that arises under this section is the rule that the property of A must be A's property independently

[17] *e.g.*, *Tomkyns* v. *Blane* (1860) 28 Beav. 422, especially at p. 428 *per* Romilly M.R.
[18] [1905] 1 Ch. 191; see especially *per* Farwell J. at p. 197.
[19] [1910] 1 Ch. 1.
[20] [1902] 1 Ch. 436.
[21] [1918] 1 Ch. 492 at p. 501, in a reserved judgment.
[22] See particularly Gray, *Rule against Perpetuities* (4th ed.), § 556 *et seq.*
[23] It is true that T, not A, *causes* the release of the property by A, but it would seem preferable to look at the actual dispositions of property, not their source. Nevertheless, if this view is upheld, other anomalies follow; see *post*, p. 483.
[24] [1957] Ch. 145.
[25] *Carver* v. *Bowles* (1831) 2 R. & M. 301; *Churchill* v. *Churchill* (1867) L.R. 5 Eq. 44. *Cf. Re Neave* [1938] Ch. 793. Fry J. in *White* v. *White* (1882) 22 Ch.D. 555 attempted to limit this rule, but his ground of doing so is not clear.
[26] *Woolridge* v. *Woolridge* (1859) Johns. 63 at p. 69; a view to be explained in terms of the special rule as to appointments that are prima facie absolute but with an improper qualification appended.
[27] *Jarman on Wills* (8th ed.), pp. 845–846 and note (z).

of the will that raises the question of putting A to his election. For instance, T's gift of his own property to B is void for informality or perpetuity; it goes to A as residuary beneficiary. A is not required to elect between the property which T failed to give to B and other property which he receives as part of residue. The point was firmly taken by James V.-C. in *Wollaston* v. *King*,[28] a decision that is a turning point in the evolution of the doctrine.

> T had under a marriage settlement a special power of appointment in favour of the children of her marriage, who were also the persons to take in default of appointment. By her will T appointed part of the fund to her son for life and the remainder to her daughters, A. The appointment included a general power of appointment given to the son, but the appointments which the son made under it were void for perpetuity and the consequence was that the property appointed by him was caught by the residuary appointment to the daughters, A. The daughters were also given other property by T's will. James V.-C. held that the daughters were not put to their election between this other benefit under T's will and the windfall. They took the windfall not in *default* of appointment under the marriage settlement, but as the result of an appointment under T's will, and their rights accordingly arose *wholly* under this will. It could not be said that any property of theirs outside of and independent of this will had been disposed of. "The rule as to election is not to be applied as between one clause in a will and another clause in the same will."[29]

This principle is at the basis of most recent statements of the doctrine, and the early cases based on a wide view of electing between any two benefits in the same instrument must accordingly be treated with caution.[30] Nevertheless the wide view was followed by Neville J. in *Re Macartney*.[31]

> In this case T purported to bequeath to B stock that T held as a trustee; the legacy of course failed. The beneficial interest in the stock was vested in a company, which was a subsidiary of a company the shares in which were held mainly by T. The shares in this latter company he bequeathed to his children, A, who in this way received the beneficial interest in the stock

[28] (1869) L.R. 8 Eq. 165; Tiley, p. 298.
[29] (1869) L.R. 8 Eq. 165 at p. 174. The judge spelt this principle out of *Carver* v. *Bowles* but this case is to be supported, if at all, on other grounds, *supra*, notes 25 and 26.
[30] See Viscount Maugham in *Lissenden* v. *Bosch* [1940] A.C. 412 at p. 419.
[31] [1918] 1 Ch. 300; Tiley, p. 299. See Pettit, p. 470, for further convincing criticism of this decision.

intended for B. No property previously vested in A was disposed of by T in his will, but Neville J. nevertheless took the view that equity would intervene to subject the shares bequeathed to A to a charge under which B would be compensated for the loss of her legacy.

This result could be justified only if there existed in equity a wide principle of producing rough justice among beneficiaries, as indeed the judge realised when he placed reliance on the view that "A volunteer under a will cannot take the benefit and at the same time wilfully defeat the expressed intentions of the testator."[32] Logically this would mean that residuary beneficiaries would always have to compensate beneficiaries of specific gifts that failed. This is not a general proposition of present-day equity and certainly is not part of the technical doctrine of election.

It is right, then, to regard James V.-C.'s decision in *Wollaston* v. *King*[33] as authoritative.[34] It is true that his principle does not emerge clearly out of earlier cases, but this is possibly because most of them involved realty which, unless effectively disposed of, went to the heir-at-law *by virtue of superior title*. Around the heir-at-law there arose some very complicated learning. Sometimes his interest as heir-at-law was regarded as causing an election. Sometimes his being heir-at-law (of English freeholds) was given as a reason for not making him elect. This learning has no relevance today. Suppose that T validly disposes of half his estate, ineffectively disposes of a quarter to B and fails to dispose altogether of the last quarter. A takes the two quarters on intestacy. It is submitted that he has not to elect between the quarter not disposed of at all and the quarter ineffectively disposed of to B. Those taking on intestacy under the 1925 legislation have no prior proprietary interest[35] and should not be in a different position from residuary beneficiaries.

[32] [1918] 1 Ch. 300 at p. 303. This is a maxim of uncertain application, not a rule. *Cf. Re Sturt* [1922] 1 Ch. 416; Tiley, p. 306.

[33] (1869) L.R. 8 Eq. 165; Tiley, p. 298.

[34] Under *Wollaston* v. *King*, *supra*, a devise of *his own property* by T that fails for, *e.g.*, perpetuity, and benefits the residuary devisee, A, does not put the devisee to an election between that and other benefits. But if T's devise was void for perpetuity *and* was of A's property, not his own, on the view expressed above at p. 481, A would be put to an election between the property devised and other benefits given to him in T's will. So that a void gift is given some effect by being of another's property, which is an unpalatable conclusion. On this indirect ground, there is an advantage in supporting the trend of authority leading to *Re Nash* [1910] 1 Ch. 1 and not the academic view following *Re Bradshaw* [1902] 1 Ch. 436; Tiley, p. 296.

[35] *Cf. Lall* v. *Lall* [1965] 1 W.L.R. 1249; *ante*, p. 93; *Cooper* v. *Cooper* (1874) L.R. 7 H.L. 53 has not received any discussion in this context.

C. The Gift of Property to the Person Electing

The third requirement for election is that the testator should, in the same instrument, have given some property of his own to A. This can be neatly illustrated by a comparison of *Bristow* v. *Warde* [36] and *Whistler* v. *Webster*.[37]

> In the former case T, who had a power to appoint among children, A, appointed some of the property to them and some to strangers, B. It was held by Lord Loughborough L.C. that A could set aside the appointment to B and take the whole property. Election did not arise even though A were entitled in default of appointment, as A received no other benefits under T's will. But in the latter case, on analogous facts, A were put to their election as they did receive other benefits under T's will.

It is essential that the property given to A is given to him beneficially and in such form as to be alienable; for the property has to be available to compensate B if A elects to take against the will.[38] The property need not be an absolute interest, but if it is a defeasible gift for instance, or a gift on protective trusts, so that it is not effectively alienable, no election will arise. In earlier cases this rule was based on supposed intent, the theory being that a gift of an inalienable interest could not have been intended to cause an election. This is an unreal way of looking at the matter, as was perceived by Astbury J. in *Re Hargrove*.[39] What matters is the nature of the interest created: is it, at the time of the testator's death,[40] effectively available for compensation? As has been seen, if A elects to take with the will, B only gets whatever A has in an alienable form. Equally, if A elects to take against the will, there is no question of B being able to get more than what T provided for A in his will and is in an alienable form.[41] But this includes all that T has in fact provided for A by his will, whether or not the will takes effect precisely as T intended.[42] The distinction is between all the property acquired by A under T's will and property after-acquired by A independently of T's will: the latter is immune from the election.[43]

[36] (1794) 2 Ves.Jr. 336.
[37] (1794) 2 Ves.Jr. 367.
[38] *Re Vardon's Trusts* (1885) 31 Ch.D. 275; *ante*, p. 142.
[39] [1915] 1 Ch. 398 at 406. *Cf. Re Fletcher's S.T.* [1936] 2 All E.R. 236.
[40] This date is preferable to the date of election in that it puts less premium on chance events. *Cf. post*, p. 485.
[41] *Re Lord Chesham* (1886) 31 Ch.D. 466; Tiley, p. 292.
[42] *Cooper* v. *Cooper* (1874) L.R. 7 H.L. 53.
[43] *Grissell* v. *Swinhoe* (1869) L.R. 7 Eq. 291.

3. Nature of an Election and Conclusion

Where A is under a duty to elect, the property he is given under T's will is regarded as being subject to a form of equitable charge. This is most clearly shown by the situation that arises if A dies before he has elected. Where his assets devolve so that no one person can elect in his place, the property given to him under T's will devolves subject to the charge, and can only be claimed by the person entitled if B is compensated, so far as is possible, out of it.[44]

Benefits passing as the result of an election are of a testamentary character; what B will receive will be a testamentary gift, and, where A elects to take with the will, A's prior property will become part of T's assets liable for the payment of his debts.[45]

An election may be express, or implied (as by receiving rents), but it must have been made with a full appreciation of the issues involved.[46] When made, it refers back to the date of the gift; for instance, the amount of compensation B will receive depends upon the valuation *at the date of T's death* of the property A elects to retain.[47]

An overall consideration of these technical rules reveals a doctrine far removed from the apparently simple principle from which it derives. In its present form, election is too uncertain an instrument of equity. Is there an adequate rationale for it? In practice, most election cases arise not from eccentricity of testation but from mistake. Ordinarily, mistakes in a will are not remedied by equity, but in this context they are. Why? Because there is to hand a wide and ancient principle, not invented to cover mistakes, but which in this context has come to be more concerned with mistakes than with anything else. But the real question, and the only one in relation to which it is justifiable to consider the merits of election, is whether a more general jurisdiction to correct mistakes should exist. There is limited merit in a doctrine that deals only in mistakes as to other people's property.

[44] *Pickersgill* v. *Rodger* (1877) 5 Ch.D. 163; Tiley, p. 294; *cf. Rogers* v. *Jones* (1876) 3 Ch.D. 688.
[45] *Re Booth* [1906] 2 Ch. 321; *Re Williams* [1915] 1 Ch. 450.
[46] *Kidney* v. *Coussmaker* (1806) 12 Ves. 136; *Dillon* v. *Parker* (1822) Jac. 505; (1833) 1 Cl. & Fin. 303.
[47] *Re Hancock* [1905] 1 Ch. 16.

CHAPTER 25

PERFORMANCE

1. Covenants in Marriage Settlements 486
2. Intestacy 488

THE equitable doctrine of performance [1] is closely related to the doctrines of satisfaction and ademption. All three doctrines can be traced to the maxim "Equity imputes an intention to fulfil an obligation"; and the principle of performance is, that where A is bound in equity to do something for B but leaves that thing undone, equity may in appropriate circumstances feel able to regard something else that A has done as performance of that obligation. It is not a matter of equity regarding that not done as done, so much as a matter of equity regarding what has been done as done in performance of an obligation.[2] There must, accordingly, be some positive acts on the basis of which equity can impute this intention, and this fact serves to distinguish performance from the doctrine whereby property subject, on it vesting in a covenantor, to an obligation to settle, may be regarded from the moment that it does vest as subject to the settlement.[3]

1. COVENANTS IN MARRIAGE SETTLEMENTS

The doctrine [4] is associated first with covenants in a marriage settlement to lay out money on the purchase of land to be held on the trusts of the settlement. Frequently, the doctrine provided the means of solving a dispute between those entitled under the covenantor's will (or intestacy) to his realty and personalty. The problem is illustrated by *Lechmere* v. *Carlisle*.[5]

Upon the marriage of Lord and Lady Lechmere, articles were entered into whereby Lord Lechmere covenanted to lay out, within a year after his marriage and with the consent of

1 Which is quite distinct from part performance; *ante*, p. 40.
2 See *per* Kenyon M.R. in *Sowden* v. *Sowden* (1785) 1 Cox Eq. 165 at p. 166 and *per* Lord Brougham in *Tubbs* v. *Broadwood* (1831) 2 R. & M. 487 at p. 493.
3 *Ante*, p. 141.
4 The doctrine of performance is occasionally cited as one of general application—see *per* James V.-C. in *Thacker* v. *Key* (1869) L.R. 8 Eq. 408 at p. 416—but is more frequently associated with the specific instances now to be discussed.
5 (1733) 3 P.Wms. 211; Tiley, p. 175. For some further problems, see (1964) 38 Aust.L.J. 147 at pp. 155–156 (M. C. Cullity).

the trustees, £30,000 in the purchase of freehold lands in fee simple in possession. The lands, when purchased, were to be settled for his use for life, with remainder, subject to the payment of a jointure to his widow, to the first and other sons in tail male, with an ultimate remainder to Lord Lechmere himself. Lord Lechmere died intestate without issue, and without having complied with his covenants. Under the doctrine of conversion,[6] the £30,000 was to be considered as realty and so devolving on Lord Lechmere's heir-at-law. But a dispute arose as to whether, from that sum, there should be subtracted the value of other realty that devolved on the heir-at-law. At the time of marriage, Lord Lechmere owned estates in fee simple; after marriage he purchased, and contracted to purchase, more, some being in possession and some in reversion. But for none of these purchases did he seek the trustees' consent. Lord Talbot held that the purchases of, and contracts to purchase, the estates *in possession* should be regarded as intended as a partial performance of the covenant to lay out £30,000, although they had not been entered into within a year of marriage, nor had the trustees' consent been obtained, nor had the estates been settled. Equity would, despite the difficulties, identify these estates as purchased in performance of the covenant, so that their value could be deducted from the sum of money devolving on the heir-at-law. He could not have these estates and their value. But Lord Talbot refused to identify the purchases of the estates in reversion as in performance of the covenant, which spoke expressly and exclusively of estates in possession. Nor could estates already owned by Lord Lechmere at the time of his marriage be taken as intended performance of a covenant to purchase after marriage.

In this case the money was to be laid out by the covenantor. But when the covenant is to pay money to trustees to be laid out by them in the purchase of land, the covenantor can still be regarded as performing, wholly or partially, this covenant by purchasing land himself; again, when the covenant is just to settle property of a certain value, purchases made subsequently to the covenants can be taken in performance, at least where the covenantor had no property which could have been settled at the time of his entry into the covenant.[7] In one case the doctrine was also applied to cover an obligation to settle imposed by a statute.[8] But the doctrine is, in

[6] *Post*, p. 505 *et seq.*
[7] *Sowden* v. *Sowden* (1785) 1 Cox Eq. 165; *Deacon* v. *Smith* (1746) 3 Atk. 323.
[8] *Tubbs* v. *Broadwood* (1831) 2 R. & M. 487.

general, probably restricted to covenants which can be enforced by those entitled under the settlement to enforce it, and so does not assist volunteers.[9]

Equity will regard property, which it identifies as bought in performance of a covenant, as subject to the rights of the beneficiaries from the moment of purchase. But this is a somewhat *ex post facto* rationalisation. For if meanwhile the covenantor has sold or mortgaged the land, equity will say that he did not mean his purchase to be in performance of his obligation. Hence a purchaser or mortgagee is not affected and there is nothing for a beneficiary to register so as to secure his position.[10] Covenants to settle property already owned by the covenantor, and covenants to settle after-acquired property, both stand on a different footing.[11]

2. Intestacy

The second type of case with which the doctrine of performance is associated is that of performance through an intestacy. Where A covenants to leave by his will, or that his executors shall pay, a sum of money or part of his personal estate to B, and A dies intestate, and under his intestacy B becomes entitled to a portion of A's personal estate,[12] B cannot claim both the agreed sum or share and the intestate portion, for the intestate portion is deemed to be a performance, or *pro tanto* performance, of the covenant. This, like other aspects of the doctrine of performance, rests on presumed intention.

> In *Blandy* v. *Widmore*,[13] by the marriage articles of A and B, it was agreed that A should leave B £620 by will if B survived him. A died intestate and B became entitled thereon to more than £620. It was held that she had no separate claim for the £620 covenanted, as this covenant was deemed performed.

But the position is different if the covenant was one to be performed during the covenantor's life and not later.

> In *Oliver* v. *Brickland*,[14] A covenanted that he would, within two years of marriage, pay to B a sum of money. The

[9] *Cf.*, in relation to the maxim that equity looks on that as done which ought to be done, *Re Anstis* (1886) 31 Ch.D. 596 at p. 605, *per* Lindley L.J.
[10] But see *Ex p. Poole* (1847) 11 Jur. 1005.
[11] See *Mornington* v. *Keane* (1858) 2 De G. & J. 292; L.C.A. 1925, ss. 10 and 13.
[12] Whether more or less than that covenanted; *Garthshore* v. *Chalie* (1804) 10 Ves.Jr. 1, in which case the doctrine is reviewed at length by Lord Eldon.
[13] (1716) 1 P.Wms. 323.
[14] (1732) cited 3 Atk. 420; *Lang* v. *Lang* (1837) 8 Sim. 451. Contrast *Lechmere* v. *Carlisle* (1733) 3 P.Wms. 211; Tiley, p. 175.

sum taken by B on A's intestacy some years later could not be deemed performance of A's obligation, which had simply been broken. Performance can, however, take place by intestacy of a covenant to leave by will *or* by deed.[15]

Performance, as so far considered in this section, does not extend to obligations being satisfied by provisions in wills, though it may be added that performance does extend to cases where a will fails, so producing an intestacy.[16] The doctrine of performance is sometimes said, however, to extend to cases where a covenant is followed by a legacy[17] that yields a similar effect. Unfortunately the cases are confused in that, in them, performance as a doctrine is not kept sufficiently distinct from satisfaction. But the rules of performance are less inflexible than those of satisfaction,[18] particularly in relation to performance *pro tanto,* so that the possibility of performance having a role to play in this situation should not be overlooked.[19] The special case of portion debts is considered below.[20]

[15] *Lee* v. *Cox and d'Aranda* (1747) 3 Atk. 419; Tiley, p. 173.
[16] *Goldsmid* v. *Goldsmid* (1818) 1 Swan. 211.
[17] Not a devise, or a bequest of other than money.
[18] *Post*, p. 490 *et seq.*
[19] See Cullity in (1964) 38 Aust.L.J. 147 especially at p. 153, reviewing the tangled web of authority. For an illustration in recent times, see *Re Hall* [1918] 1 Ch. 562.
[20] *Post*, p. 492.

CHAPTER 26

SATISFACTION

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1. GENERAL

"SATISFACTION," "ademption" and "performance" must be distinguished. "Ademption" is best confined to signify the disappearance of a specific legacy through the destruction or disposal before death of its content, a topic which, like the question of construction that arises where two legacies are given in the same will to the same person (sometimes termed satisfaction of legacies by legacies), belongs rather to a treatise on wills than a general textbook on equity.[1] But at the heart of all these issues rests the maxim "Equity imputes an intent to fulfil an obligation," and the principle of preserving equality amongst children. But while, in performance, the act which the party obligated himself to do is considered actually to have been done, in satisfaction, something that is accepted as different from the act agreed to be done is taken as equivalent to it. Both doctrines are said to rest upon intention, but the courts do not allow much scope for subjective intention; presumptions are much relied on.

2. SATISFACTION OF DEBTS BY LEGACIES

A. The Presumption

Suppose a legacy is given to a person to whom the testator owed in the ordinary way a debt (including a covenant to pay money in a lump sum or by way of an annuity, but excluding questions of portion debts[2]). Can the legatee claim the legacy and the debt?

[1] See *ante*, p. 462. In *Re Carrington* [1932] 1 Ch. 1, ademption was confused with conversion, by being used to denote, not a destruction of the content, but a change in its character. *Post*, p. 510.

[2] *i.e.*, an obligation by a parent to make a payment to a child by way of an advancement; *post*, p. 492.

Equity's attitude to this question is certainly based on intention, for if the legacy is expressly said to be given in reduction of the debt, the legacy must be given that effect; and intention goes further than this, for in *Hammond* v. *Smith*[3] a legacy was taken as *pro tanto* satisfaction of a debt, in view of the peculiar circumstance that the testatrix had in her lifetime made a proposal to that effect to her creditor, who had not objected to it. But, generally, the question is decided on presumptions of intention founded on the terms of the will itself.

There is a presumption that if a debtor, without mentioning the debt in his will, gives a legacy to his creditor, then the legacy destroys or swallows up the debt in the sense, of course, that the legatee has an option; he can choose to receive the legacy but he thereby admits that he can no longer enforce the debt.[4]

But while this presumption is unquestioned where it operates, it must be noted that its field of operation is greatly circumscribed.[5]

B. Limited Operation of the Presumption

First, the presumption only applies where the debt existed prior to the making of the will[6]; and the presumption does not apply to a running account, *e.g.*, a trade account.[7] Secondly, the presumption does not apply if the will contains a direction to pay debts,[8] which of course any well-drafted will should contain. Thirdly, the presumption only applies if the legacy is in sum as great as, or greater than, the legacy and is in every circumstance as beneficial as the debt: there is thus no possibility of *pro tanto* satisfaction, as there is with performance. On this third point a large amount of unattractive learning reflects the desire of the courts to limit the operation of the basic presumption. Thus there will be no satisfaction where the gift by will is of the whole or of a share of the residue, nor where it is a devise of land, or a gift of chattels, or a conditional gift, or an unsecured gift if the debt was secured.[9] There is doubt

[3] (1864) 33 Beav. 452. *Cf. Re Hall* [1918] 1 Ch. 562.
[4] *Thynne* v. *Glengall* (1848) 2 H.L.C. 131; *Chichester* v. *Coventry* (1867) L.R. 2 H.L. 71; Tiley, p. 248 (cases on portion debts).
[5] In *Re Horlock* [1895] 1 Ch. 516 at p. 518 Stirling J. said: "No sooner was it established than learned judges of great eminence expressed their disapproval of it, and invented ways to get out of it."
[6] *Cranmer's Case* (1702) 2 Salk. 508; *Horlock* v. *Wiggins* (1888) 39 Ch.D. 142; Tiley, p. 168. If the debt is discharged between the date of the will and the date of death, the legacy is adeemed, at least where the sums are identical: *Re Fletcher* (1888) 38 Ch.D. 373.
[7] *Rawlins* v. *Powel* (1718) 1 P.Wms. 297 (Earl Cowper L.C.).
[8] *Bradshaw* v. *Huish* (1889) 43 Ch.D. 260; *Re Manners* [1949] Ch. 613.
[9] *Barret* v. *Beckford* (1750) 1 Ves.Sen. 519; *Eastwood* v. *Vinke* (1731) 2 P.Wms. 613; *Crichton* v. *Crichton* [1895] 2 Ch. 853; *Re Stibbe* (1946) 175 L.T. 198; *Re Van den Bergh's W.T.* [1948] 1 All E.R. 935; Tiley, p. 169.

whether a legacy can be satisfaction of a debt due at a specific time prior to the probable date of distribution under the will, or whether a legacy can be satisfaction of a debt of exactly similar amount at a rate of interest [10]; on these points it would seem sensible to deny satisfaction when there was a particular difference between the debt and the legacy, but not to deny it on grounds which are merely a restatement of the differences in the manner of payment between testamentary and *inter vivos* discharges of obligation.

These cases can be fitted together and understood only by recognising the basic rule, but the basic rule is not now one of wide importance. Nevertheless a recent example of it is provided by *Re Haves.*[11]

> A testamentary annuity of £3 a week, charged on the whole of the testator's estate, was held to be satisfaction of a covenant for an annuity entered into by the testator in favour of his wife at the date of the dissolution of their marriage, which covenant was also for £3 a week and which was charged on specific assets.

3. Satisfaction of Portion Debts by Legacies. The Rule Against Double Portions

The moment that portions fall to be considered, the principle of presumed equality amongst children becomes of great importance. Many of the cases on portions involve a type of family disposition that is a reminder of nineteenth century social conditions, but the rule remains that portion debts may be satisfied by legacies on a wider basis than in the case of ordinary debts. The presumption is that "Equity leans against double portions," so that a child should not take under the will and sue for the portion debt.

A. What is a Portion?

To bring the rule into operation, there must be both an unsatisfied portion debt and a testamentary provision by way of portion. Ordinary debts, even between father and child, are governed by the ordinary rules. What then transforms a debt or a gift into a portion? It must be a gift made, or an obligation undertaken, by a parent to a child, or by one *in loco parentis* to one in his charge, with the intent of setting that child up in life. This is a question of

[10] *Re Horlock* [1895] 1 Ch. 516; *Re Rattenberry* [1906] 1 Ch. 667; *Fitzgerald* v. *National Bank* [1929] 1 K.B. 394; *Re Stibbe, supra.*

[11] [1951] 2 All E.R. 928.

intent but, generally speaking, a portion must be sufficiently substantial to enable something adequate to be done with it, though this, too, is relative to the wealth of the parent and the age of the child.[12] Separate sums will not be added together to constitute a portion, nor will casual gifts or gifts to discharge debts ordinarily count. The intent must be to *establish* the child, and not just make a gift.[13] A gift of stocks and shares, or a business itself, can constitute a portion.[14]

B. To Whom Does the Rule Apply?

The presumption of satisfaction applies without question to father and legitimate child; but in all other cases, it only applies where a person systematically acts in relation to a child so as to demonstrate the intention of making full provision for the child. This is easier to show in the case of a mother, or the father of an illegitimate child, than in the case of an uncle or a grandfather, but in *Pym* v. *Lockyer*[15] a wealthy grandfather was held to have placed himself *in loco parentis* to his grandchildren though their father was living.

C. Strength of the Presumption

The greater ambit of the presumption in respect of portions can be illustrated in several ways. In the case of an ordinary debt, a smaller legacy is not held to be in satisfaction of part of a larger debt; but in the case of portion debts, a legacy may be satisfaction *pro tanto*.[16] The same holds true of residuary gifts, which may constitute satisfaction *pro tanto* of portion debts. Greater flexibility is also shown in evaluating differences between the portion debt and the legacy, for instance in the precise character of the limitations[17]; in the case of an ordinary debt, small differences negative satisfaction, but this is not so in portions cases, where the differences must be of some substance. A contingent legacy cannot satisfy an absolute portion debt of course, but differences between forms of personal

[12] *Re Hayward* [1957] Ch. 528; Tiley, p. 253.
[13] *Taylor* v. *Taylor* (1875) L.R. 20 Eq. 155; *Re Scott* [1903] 1 Ch. 1; *Watson* v. *Watson* (1864) 33 Beav. 574.
[14] *Re Lacon* [1891] 2 Ch. 482; *Re George's W.T.* [1949] Ch. 154.
[15] (1841) 5 Myl. & Cr. 29; Tiley, p. 245; see also *Powys* v. *Mansfield* (1837) 3 Myl. & Cr. 359; *Ex p. Pye* (1811) 18 Ves.Jr. 140; *Rogers* v. *Soutten* (1839) 2 Keen 598; *Re Ashton* [1897] 2 Ch. 574; *Fowkes* v. *Pascoe* (1875) L.R. 10 Ch.App. 343. The result, sometimes, is that a child receiving a substantial provision in the ordinary way from his or her father is less favourably treated than other recipients of gifts.
[16] *Warren* v. *Warren* (1783) 1 Bro.C.C. 305.
[17] *Thynne* v. *Glengall* (1848) 2 H.L.C. 131; *Chichester* v. *Coventry* (1867) L.R. 2 H.L. 71; Tiley, p. 248.

wealth, *e.g.*, between money and stock, can be ignored.[18] It is all, of course, a matter of degree; there may well be a material difference between a fixed sum and a share in a business,[19] and gifts of land and chattels rarely constitute satisfaction unless given by reference to their pecuniary value.[20]

The presumption of satisfaction may be rebutted by extrinsic evidence as well as by evidence of intent in the will itself.[21] But extrinsic evidence may only be used to rebut the presumption, not to raise it, though, once the evidence is admitted, other extrinsic evidence may be admitted to refute it.[22] Extrinsic evidence appears to extend to words, whenever uttered, but the circumstances will obviously affect their weight. The presumption is intended to produce equality among children, but it sometimes has a further effect. For instance, the fact that the presumption only affects children means that a legacy may in some cases be satisfaction of that part of a covenant that constitutes a portion debt in favour of a child while other beneficiaries, for instance the spouse of a child, can claim under the covenant and the will.[23]

4. Satisfaction of Portion Debts by Portions

What has been said in the previous section applies to portion debts being satisfied by the payment by a covenantor of a portion during his life. It is the fact of both the obligation and the payment being in the nature of portions that attracts to them the learning of the presumption against double portions, and it is in this way that these cases are distinguishable from those considered under the doctrine of performance.[24] The matter often arose in relation to settlements upon marriage, but it is in no way restricted to such circumstances.[25]

5. Ademption of Legacies by Portions

The principle of ademption has been explained.[26] It is relevant here because the equitable presumption against double portions applies to it. Indeed, many of the cases cited in discussing the satisfaction of portion debts are ademption cases. The rule is that a legacy by

18 *Bellasis* v. *Uthwatt* (1737) 1 Atk. 426; *Re Jaques* [1903] 1 Ch. 267.
19 *Holmes* v. *Holmes* (1783) 1 Bro.C.C. 555; *cf. Weall* v. *Rice* (1831) 2 R. & M. 251.
20 *Bengough* v. *Walker* (1808) 15 Ves.Jr. 507; *Re Tussaud's Estate* (1878) 9 Ch.D. 363.
21 *Re Tussaud's Estate*, *supra*.
22 *Re Shields* [1912] 1 Ch. 591; *Re Vaux* [1939] Ch. 465.
23 *Re Blundell* [1906] 2 Ch. 222; *cf. post*, p. 495.
24 *Ante*, p. 486.
25 For an example see *Lawes* v. *Lawes* (1881) 20 Ch.D. 81.
26 *Ante*, p. 462.

way of portion is adeemed and so cannot take effect if, subsequent to the making of the will, the legatee actually receives a portion, or obtains an enforceable right, *e.g.*, by way of covenant, to receive one. The law relating to portions applies as discussed above. Thus the presumption of ademption applies only to portions between a parent (or someone *in loco parentis*) and a child; ademption can be *pro tanto*; and extrinsic evidence is admitted on the same principle. But there are some differences. First, ademption gives the legatee no choice; the *inter vivos* provision made for him prevails over his testamentary claim. Secondly, the presumption in favour of ademption is much stronger than the presumption in favour of satisfaction. The presumption in favour of satisfaction of ordinary debts by legacies may be excluded by small differences between the two; the differences must be substantial in order to exclude the presumption of satisfaction of portion debts by legacies; but the presumption in favour of ademption will yield only to really considerable differences. Special considerations arise if the will indicates the intent with which a legacy is given. Even among strangers, a legacy for a purpose which is indicated in the will itself may be adeemed, either wholly or *pro tanto*, by *inter vivos* gifts made with the identical purpose.[27]

It is sometimes said that an ademption which appears to have occurred in this type of case must not be allowed to benefit a stranger, as its aim is only to produce equality among children. This principle emerges from the judgments in *Re Heather*[28] and *Re Vaux*,[29] where it was said that strangers could not benefit from an accretion to residue as a result of the presumption occurring. But these were cases where the residue was divisible amongst children and strangers, so that there was an obvious method to hand of dealing with the accretion without benefiting the strangers. It is not easy to see how this method can be applied where the only residuary beneficiary is a stranger.

[27] *Re Pollock* (1885) 28 Ch.D. 552; Tiley, p. 213; *Re Jupp* [1922] 2 Ch. 359.
[28] [1906] 2 Ch. 230.
[29] [1938] Ch. 581 (reversed on other grounds [1939] Ch. 465 (C.A.)).

PART VI

OTHER EQUITABLE INTERESTS IN LAND

CHAPTER 27

ESTATE CONTRACTS

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1. AN ESTATE CONTRACT IS A GRANT OR CONVEYANCE IN EQUITY

AN estate contract is, in essence, a contract by an estate owner to convey or create a legal estate. The definition in the Land Charges Act 1925 is as follows [1]:

> "Any contract by an estate owner [2] or by a person entitled at the date of the contract to have a legal estate conveyed to him to convey or create a legal estate, including a contract conferring either expressly or by statutory implication a valid option of purchase, a right of pre-emption or any other like right."

The significance of the doctrine of estate contracts is that it enables equity to treat as a grant or conveyance in equity that which fails, through lack of proper formalities, to be a grant or conveyance at law.[3] Thus, a conveyance of Blackacre by A to B must, at law, be made under seal [3]; similarly with a grant of a lease for a period in excess of three years.[4] The lack of a seal renders the transaction void at law. If, however, there is an enforceable contract to convey Blackacre, or to grant the lease, equity, treating as done that which ought to be done, will, in appropriate circumstances, treat it as a valid conveyance, or grant, *in equity*.

2. CONDITIONS FOR THE OPERATION OF THE DOCTRINE OF ESTATE CONTRACTS

A. Enforceable Contracts

There must be an enforceable contract to convey or create the legal estate. Being a contract concerning an interest in land, the

[1] s. 10 (1), Class C. (iv).
[2] See *Sharp* v. *Coates* [1949] 1 K.B. 285.
[3] L.P.A. 1925, s. 52.
[4] *Ibid.* ss. 52, 54.

contract must be evidenced by some memorandum or note thereof, in writing, signed by the party to be charged or by some other person thereunto by him lawfully authorised.[5] In the absence, however, of such written evidence, equity will enforce an oral agreement if there are acts sufficient to comply with the equitable doctrine of part performance.[6]

B. The Contract Must be One which Equity Will Specifically Perform

It has been seen[7] that a contract to convey or create a legal estate is one of the categories of contract which equity will specifically perform. It was also explained that specific performance was not granted in favour of a volunteer[8]; that it was a discretionary remedy which was not available to a party who was himself in breach of the terms of the contract,[9] and that it had been said in *Purchase* v. *Lichfield Brewery Co.*[10] that specific performance would not be decreed against a person who was not a party to the contract. The view was expressed that this is erroneous. Indeed, estate contracts, creating equitable interests in land, are enforceable against everyone coming to the land with the exception of the bona fide purchaser of the legal estate for value without notice. Estate contracts are registrable as land charges Class C (iv) and, according to the usual rule, registration constitutes notice to all the world,[11] while failure to register renders the contract void as against a purchaser of the legal estate for money or money's worth.[12]

3. Types of Estate Contract

The definition of estate contract is wide. There is no difficulty in listing a number of the most common types of situation which are included within it; but the boundaries are obscure, and it seems that the practice is to register a number of contracts which do not properly qualify.

A. Contract for the Sale of Land

Jessel M.R. in *Lysaght* v. *Edwards*,[13] explaining the doctrine of estate contracts in the context of contracts for the sale of land, said

[5] *Ibid.* s. 40; *Wakeham* v. *Mackenzie* [1968] 1 W.L.R. 1175 at pp. 1178–1179.
[6] *Ante*, p. 40 *et seq.*
[7] *Ante*, p. 35.
[8] *Ante*, p. 44.
[9] *Ante*, p. 37.
[10] [1915] 1 K.B. 184.
[11] L.P.A. 1925, s. 198 (1).
[12] L.C.A. 1925, s. 13 (2).
[13] (1876) 2 Ch.D. 499 at p. 506.

". . . the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser. . . ." The purchaser can demand a conveyance of the legal estate, and may compel the vendor to convey by obtaining a decree of specific performance. Whether or not the relationship is properly one of trustee and beneficiary is doubtful,[14] because of the continued self-interest of the parties. But the situation is certainly one in which the legal ownership remains in the vendor, and beneficial ownership in the purchaser.

B. Contract for a Lease

Similarly, an enforceable agreement to grant a lease immediately creates an equitable lease in the "tenant." The doctrine applies to an option to purchase the reversion of a lease, as soon as it is conferred,[15] an option to purchase a further lease,[16] and a contract to grant an underlease.[17] The relationship between the parties is very much the same as if a legal lease had been granted.[18] But, as Maitland said,[19] "introduce the third party and then you will see the difference." In Maitland's day, however, a bona fide purchaser of the legal estate for value without notice took free of an equitable lease. The test is now one of registration. If a registrable contract for a lease is not registered, a purchaser takes free of it whether he knows about it or not.[20] If it is registered, he has notice and takes subject to it.

C. Contract to Grant an Easement or Profit à Prendre

An easement or *profit à prendre* may exist as a legal interest[21] and should be granted under seal. A contract to grant such an interest is an estate contract.

> In *McManus* v. *Cooke*,[22] there was an oral contract that a party wall should be rebuilt and that each party should be entitled to make a lean-to skylight with its lower end resting on the wall. The plaintiff built a skylight in accordance with the contract, but the defendant made alterations which obstructed

[14] *Ante*, p. 233.
[15] *Wright* v. *Dean* [1948] Ch. 686; *Re Mulholland's W.T.* [1949] 1 All E.R. 460.
[16] *Beesly* v. *Hallwood Estates* [1960] 1 W.L.R. 549, affirmed on a different point [1961] Ch. 105.
[17] *Hollington Bros.* v. *Rhodes* [1951] 2 All E.R. 578.
[18] *Walsh* v. *Lonsdale* (1882) 21 Ch.D. 9; *ante*, p. 14.
[19] *Equity*, p. 158.
[20] *Hollington Bros.* v. *Rhodes*, *supra*.
[21] L.P.A. 1925, s. 1 (2).
[22] (1887) 35 Ch.D. 681.

the access of light to the plaintiff's skylight. Kay J. held that the plaintiff was, by virtue of the contract and (there being no evidence in writing of the contract) acts of part performance, entitled to the easement.

In *Mason* v. *Clarke*,[23] a rabbit-catcher, Mason, paid £100 to the landowner for the right to catch rabbits on his land for one year. On being ejected and denied entry by a tenant of the owner, he sued for an injunction and for damages for trespass. The contract was held to be a grant in equity of a *profit à prendre*. "A *profit à prendre* is an interest in land, and no legal estate therein can be created or conveyed except by deed . . . at the relevant time Mr. Mason had a contract (with the landowner), specifically enforceable . . . for the grant of a *profit à prendre*. . . . In the circumstances he was clearly entitled to bring an action for trespass against the respondent." [24]

D. Contract to Create a Mortgage

It will be explained in Chapter 29 that a contract to create a legal mortgage is itself an equitable mortgage; and that a deposit of title deeds with the intention that they will be kept as security for a loan is construed as a contract to create a mortgage,[25] and is therefore an equitable mortgage. It seems, however, that, because of separate provisions made for the registration of mortgages in the Land Charges Act 1925, an agreement to create a mortgage is not registrable as an estate contract.[26]

E. Other Situations

The question whether or not a situation creates an estate contract is raised in the context of whether or not the contract is registrable as a land charge, Class C (iv). It is unfortunate that the dividing line between those which are and those which are not registrable is not clearly drawn. The consequences of failure to register a registrable land charge are disastrous; on the other hand, the register should not be choked up with non-registrable charges, which can prejudice the owner in dealing with his land.[27] There is inadequate control upon the registration of charges. "No proof of entitlement

[23] [1955] A.C. 778.
[24] *Per* Lord Morton at p. 798.
[25] *Russel* v. *Russel* (1783) 1 Bro.C.C. 269; *Ex p. Wright* (1812) 19 Ves. 255 at p. 258, *per* Lord Eldon.
[26] *Post*, p. 544.
[27] See *per* Megarry J. in *Thomas* v. *Rose* [1968] 1 W.L.R. 1797 at p. 1805. In *Heywood* v. *B.D.C. Properties Ltd.* [1963] 1 W.L.R. 975, the defendant, by registering an estate contract and then a pending action, made it impossible for the plaintiffs to deal with their property for a period of 21 months. No contract between the parties was ever concluded.

is required; the function of the registry is purely ministerial." [28] The complainant must take steps to vacate it.[29]

It has been held that a contract to grant a 10-year lease was void against a purchaser for lack of registration although the grantor had no more than a yearly tenancy at the time of the grant.[30] He was technically therefore "an estate owner." But it would have been better "to have held the agreement registrable as soon as the tenant, by acquiring the freehold, had property bound by his agreement." [31] For, until then, the registered interest could not bind a purchaser because the grantor did not own the legal estate in the interest agreed to be granted.

An agreement to sell the interest of a person entitled under a trust for sale is not an estate contract, for it is a personalty interest.[32] This rule provides an additional danger to those who deal with matrimonial property, for a spouse who appears to be entitled absolutely may turn out to be entitled only under a statutory trust for sale.[33]

It is difficult in some cases to distinguish between a contract to convey a legal estate in land and one which regulates certain activities concerning the land.

In *Turley* v. *Mackay*,[34] a landowner entered into an agreement with a firm of agents for the development of certain land, and agreed to "manage develop realise or dispose [of it] . . . under . . . the direction of the agents. . . ." The contract was registered as an estate contract, and Uthwatt J. refused to vacate it. The section is not "limited to cases where the obligation is to convey or create a legal estate in favour of the person with whom the obligation is entered into." It is sufficient that "one person is bound to a second person to create a legal estate in such a third person as the second person may direct."

This case was distinguished by Megarry J. in *Thomas* v. *Rose*,[35] where an informal agreement, also between an owner and an agent, provided, *inter alia*, that the agent should have the right to refuse or accept any offer for the property, and "full rights to make the final decision regarding the disposal" of all the land. Here there was no "obligation on the plaintiffs' part to create or convey any

[28] (1968) 118 New L.J. 1167 (S. M. Cretney).
[29] *Heywood* v. *B.D.C. Properties Ltd., supra*; *Boobyer* v. *Thorville Properties Ltd.* (1968) 19 P. & C.R. 768.
[30] *Sharp* v. *Coates* [1949] 1 K.B. 285.
[31] M. & W., p. 1033.
[32] *Re Rayleigh Weir Stadium* [1954] 1 W.L.R. 786.
[33] *Waller* v. *Waller* [1967] 1 W.L.R. 451; Matrimonial Homes Act 1967, s. 1 (5); *cf. Caunce* v. *Caunce* [1969] 1 W.L.R. 286.
[34] [1944] Ch. 37.
[35] [1968] 1 W.L.R. 1797.

legal estate in favour of anyone." [36] It was merely a contract providing for the making of a further contract to convey or create a legal estate.

There is a clear difference in the approaches of Uthwatt J. and Megarry J. The former found the objective of the Land Charges Act 1925 to be "to secure that obligations affecting land may be registered by persons who have a commercial interest in seeing that those obligations shall be carried out." [37] Megarry J. pointed out that the contract must be one "affecting land"; and "the only contracts that fall within Class C (iv) are those which themselves bind the estate owner . . . to convey or create a legal estate." [38] The agent's claim in both cases was a money claim. Registration of a land charge is essentially concerned with the question of the binding effect of the land charge upon land when in the hands of a purchaser. It is submitted that Megarry J.'s approach is to be preferred.

[36] *Ibid.* at pp. 1804–1805.
[37] *Turley* v. *Mackay* [1944] Ch. at p. 41.
[38] *Thomas* v. *Rose*, *supra*, at p. 1805.

CHAPTER 28

CONVERSION AND TRUSTS FOR SALE

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1. INTRODUCTION

SOME aspects of the trust for sale depend upon the equitable doctrine of conversion. It is proposed therefore to explain this doctrine before proceeding to trusts for sale in their modern form. Conversion is an offshoot of the wide jurisdiction gained by the Court of Chancery in the eighteenth century over the administration of the estates of deceased persons. It was necessitated by the distinction between realty and personalty and was of great importance when this distinction governed intestate succession. This situation was abolished by the Administration of Estates Act 1925, but the doctrine of conversion is still of significance today in that testators may explicitly devise realty to R and personalty to P; but of greater importance is the fact that the doctrine is firmly embedded in the mechanics of the modern law. The doctrine, supplemented by certain explicit statutory provisions,[1] determines for instance when

[1] *e.g.*, S.L.A. 1925, s. 75; Mental Health Act 1959, s. 107.

land held upon trust will be treated as realty and when as personalty.

The basis of the doctrine is the maxim "Equity looks on that as done which ought to be done." To illustrate this with the simple case of an express trust for sale: if there is a trust for sale of land, equity notionally regards that land as money from the moment when the instrument creating the trust takes effect,[2] that is, the date of death in the case of a trust created by a will, or the date of execution of a deed.[3] The land will devolve as personalty irrespective of the precise time at which the sale takes place, thus preventing the devolution of beneficial interests from being altered by failure or delay on the part of the trustees in executing this duty to sell. Conversely, if there is a trust of money wherewith to buy land, equity notionally regards that money as turned into land at the corresponding moment. This notional conversion will determine the devolution of assets disposed of, in the example given above of realty to R and personalty to P.

The courts have been consistent in adhering to the principle of conversion when considering devolution, but they have been less so when construing "interest in land" and analogous phrases in statutes. For, in suitable cases, the former expression can include land held upon trust for sale, for instance in connection with the memorandum required by section 40 of the Law of Property Act 1925.[4] But in connection with the Limitation Acts, for instance, the principle of conversion has been rigorously applied to land held upon trust for sale.[5]

2. Power of Sale Distinguished

It is most important, however, to distinguish a trust for sale, which produces an immediate notional conversion, from a mere power of sale, which produces a conversion only when the power is actually exercised.[6] The distinction is, however, easier in practice to state than to draw. A trust is mandatory, while a power is discretionary. But a power to postpone sale is easily compatible with an imperative duty to convert, as it is a trustee's duty to consider and wait for the best time to sell. And, by virtue of section 25 (4) of the Law of

[2] The doctrine is shown as clearly established in *Lingen* v. *Sowray* (1715) 1 P.Wms. 172. The leading case is *Fletcher* v. *Ashburner* (1779) 1 Bro.C.C. 497.

[3] Even though sale cannot take place at that date: *Clarke* v. *Franklin* (1858) 4 K. & J. 257, and *cf.* the cases on consents, considered *post*, p. 521.

[4] *Cooper* v. *Critchley* [1955] Ch. 431. Some statutes deal explicitly with these issues. There may even be a distinction in this respect between express and statutory trusts for sale: L.P.A. 1925, s. 16 (4); *post*, p. 524.

[5] *Re Landi* [1939] Ch. 828. See also the cases discussed *post*, p. 508.

[6] *Re Dyson* [1910] 1 Ch. 750; *ante*, p. 95.

Property Act 1925, a trust either to retain or to sell land is to be construed as an imperative direction to convert coupled with a discretion to postpone.[7] Where the wording of a deed or will is inconclusive of the issue, as in *Re Raw*,[8] where there was a direction to executors to "sell and convert into money . . . my land, houses and other property whenever it shall appear to their satisfaction that such sale shall be for the benefit of my children," the courts will decide the matter in the light of the whole tenor of the provisions, including any relevant words of limitation.[9]

3. Statutory Trusts

The operation of the doctrine has been extended since 1925 from the ordinary case of the express trust to the statutory trusts[10] imposed by the property legislation of that year on certain situations, namely:

A. Intestacy

This is the situation when an owner of property, real or personal, dies intestate.[11]

B. Co-ownership

This occurs where two or more persons become entitled to land as beneficial joint tenants or tenants in common.[12]

This provision makes it possible to avoid the extreme complications which co-ownership at law could create in titles to land.[13] After 1925, the legal title remains in the trustees for sale[14] who hold as joint tenants on trust to sell and to hold the proceeds of sale on trust for those beneficially entitled according to their interests. The imposition of the trust for sale in this situation is a device to transfer the complications of co-ownership from the legal

[7] *Cf. Cowley* v. *Hartstonge* (1813) 1 Dow. 361.
[8] (1884) 26 Ch.D. 601. The direction was held imperative. *Cf. Re Twopeny's Settlement* [1924] 1 Ch. 522.
[9] *Earlom* v. *Saunders* (1754) Amb. 241; *Walker* v. *Denne* (1793) 2 Ves.Jr. 170; *Evans* v. *Ball* (1882) 47 L.T. 165.
[10] Defined by L.P.A. 1925, s. 35, as follows: "upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits until sale after payment of rates, taxes, costs of insurance, repairs, and other outgoings, upon such trusts . . . as may be requisite for giving effect to the rights of the persons . . . interested in the land. . . ."
[11] A.E.A. 1925, s. 47; *ante*, p. 463 *et seq.*
[12] L.P.A. 1925, ss. 34, 36.
[13] M. & W., p. 419; Cheshire, p. 311.
[14] Or, if there are more than four, in the first four named in the conveyance; L.P.A. 1925, ss. 34 (2), 36 (1).

title to the equitable interests behind the trust for sale, so that the land can be sold without the purchaser being concerned with the beneficial interests. There was no wish to turn such interests into personalty; but the trust for sale was the most convenient way of turning the beneficial interests into equitable interests, and it had the effect also of turning them into personalty.

The imposition of a statutory trust for sale in co-ownership cases had some unintended and unexpected results.

In *Re Newman* [15] a testator who was tenant in common of land had, before 1926, made a will which included a devise of his undivided share. On his death in 1929 the question was whether the devisee could take. It was held that he could not, for the testator no longer held an undivided share in land, but only in the proceeds of sale, the land having been notionally converted into money as soon as the Law of Property Act 1925 came into force.[16]

But it seems that the court will avoid this result if it can find any loophole for doing so, as in *Re Warren*,[17] where the testator used language wide enough to carry any interest in the property, whether realty or personalty, and in *Re Harvey* [18] where there was a codicil, made after 1925, which could be interpreted as republishing the will; or where the testator uses words which indicate an intention to give all his interest in the land whatever it may be.[19]

C. Mortgaged Property Free from Right of Redemption

Where property, vested in trustees by way of security (*i.e.*, where trustees have lent money on mortgage) becomes discharged from the right of redemption (*e.g.*, by foreclosure [20] or by the operation of the Limitation Act [21]) it shall be held on trust for sale.[22]

D. Personalty Settlements

Where a settlement of personalty [23] contains a power to invest money in the purchase of land, such land shall, unless the settlement otherwise provides, be held by the trustees on trust for sale.[24]

15 [1930] 2 Ch. 409; following *Re Kempthorne* [1930] 1 Ch. 268; Tiley, p. 233.
16 *Re Price* [1928] Ch. 579; Law of Property (Entailed Interests) Act 1932, s. 1.
17 [1932] 1 Ch. 42; Tiley, p. 214.
18 [1947] Ch. 285.
19 *Re Wheeler* [1929] 2 K.B. 81n.; *Re Mellish*, unreported, noted at [1929] 2 K.B. 82.
20 *Post*, p. 570.
21 *Post*, p. 572.
22 L.P.A. 1925, s. 31 (1).
23 Made after 1911 (L.P.A. 1925, s. 32 (2)). This includes a settlement of land held upon trust for sale.
24 L.P.A. 1925, s. 32 (1).

4. Contracts for Sale and Options

Conversion is a doctrine which applies not only to express trusts,[25] but also to enforceable contracts for the sale of land.[26] When such a contract is signed, equity regards the purchaser as owner in equity [27]; he becomes owner at law when the conveyance is executed. Equity also regards the land in the vendor's hands as personalty, thus providing for a devolution in favour of those entitled to his personalty.

The doctrine has been extended beyond the case of a contract, and held to apply to the exercise of an option. Here we are in a backwater of equity known as the rule in *Lawes* v. *Bennett*.[28] The rule is not a satisfactory one, in that it represents an abuse of the doctrine of conversion, which it forces into a situation to which there was no necessity to apply it. If A grants to B a lease of Blackacre, which contains an option for B to purchase the freehold, and then dies, to whom do the rents of Blackacre go pending the exercise of the option to purchase? Clearly they must go to the person in whom is vested the freehold, namely, the residuary or specific devisee, as the case may be, and in this sense the law is laid down in *Townley* v. *Bedwell*.[29] Common sense would seem to dictate that, having received the income for a year or two, he should eventually, on the exercise of the option by B, receive the capital, wherewith he can find a new investment. He may retain the income he has received, but a sort of spurious doctrine of conversion operates to hand the purchase-money over to the residuary legatee, on the footing that conversion into personalty is effected as from the exercise of the option; and this principle has been applied where the giver of the option died intestate, as well as where he made a will, and even, as in *Re Isaacs*,[30] where the time for the exercise of the option had been postponed by him until after his death.

But the principle is not applied where a testator has shown, on the face of his will, a clear intention that his *entire* interest in his land is to pass to a specific devisee, for such an intention is strong enough to override the doctrine of *Lawes* v. *Bennett*,[31] and to carry

[25] It also applies to partnership land and orders for sale by a court, for instance in the case of infancy. Conversion applies as from the date of the order: *Pole* v. *Pole* [1924] 1 Ch. 156.

[26] Including contracts imposed by a statute: *e.g.*, *Re Galway's W.T.* [1950] Ch. 1. A notice to treat does not produce a conversion until the terms are agreed to the point at which the agreement would be enforceable as a contract. Presumably a similar rule applies to purchases of freeholds under the Leasehold Reform Act 1967; (1969) 33 Conv.(N.S.) 43, 141 (J. Tiley).

[27] The vendor is said to be a constructive trustee for the purchaser; *ante*, p. 233.

[28] (1785) 1 Cox. 167.

[29] (1808) 14 Ves.Jr. 591.

[30] [1894] 3 Ch. 506.

[31] (1785) 1 Cox 167.

the purchase-money which results from the exercise of the option to that devisee, its proper recipient. But again, the operation of these rules is technical. There will be a conversion where the specific devise comes first and the option is given afterwards,[32] but there may not be a conversion if the option is given first and the specific devise comes later; and it is even immaterial in this latter case that the will makes no express reference to the option.[33] Analogous results follow if the will, or a codicil confirming the will, is contemporaneous with the grant of the option.[34]

The doctrine in *Lawes* v. *Bennett*[35] makes the devolution of property depend upon events that occur subsequent to a testator's death. Little can be said in its defence, yet in *Re Carrington*[36] the Court of Appeal extended it to a case of an option to purchase shares given subsequently to the making of a will, thus taking the proceeds of sale away from the specific legatees and adding it to residue.

5. Reconversion

A. Circumstances in which Conversion may not Occur

Conversion depends upon a valid and imperative trust *and* someone to enforce it. This latter question raises some difficult points. If, when the instrument creating the trust comes into effect, there is a total failure of beneficiaries, no conversion will take place.[37] But if at that date there is a possibility that there may be beneficiaries, there is a wait and see principle; if a beneficiary comes into existence, a notional conversion will be assumed from the date the instrument took effect, but otherwise there will be no conversion at all.[38] If there has been a partial failure of beneficiaries, even greater complications arise. In such a case, notional conversion unquestionably occurs in a deed but, in a will, it is probable that the lapsed share will devolve under the will in its unconverted form, though its recipient will receive it in its converted form. Thus if one of the beneficiaries under a trust for sale of land set up in a will predeceases the testator, the proceeds of sale will devolve as realty to the residuary devisee but, in his hands, will be personalty. These

32 *Weeding* v. *Weeding* (1861) 1 J. & H. 424.
33 *Drant* v. *Vause* (1842) 1 Y. & C.Ch. 580; *Re Calow* [1928] Ch. 710.
34 *Emuss* v. *Smith* (1848) 2 De G. & Sm. 722; *Re Pyle* [1895] 1 Ch. 724.
35 (1785) 1 Cox 167.
36 [1932] 1 Ch. 1; criticised (1933) 49 L.Q.R. 173 (H. G. Hanbury). The court seems to have confused the doctrine of conversion with that of ademption.
37 *Re Lord Grimthorpe* [1908] 2 Ch. 675; Tiley, p. 304. Similarly with a covenant to lay out money in the purchase of land, and, at the date the covenant takes effect, the only beneficiaries are volunteers.
38 *Re Hopkinson* [1922] 1 Ch. 65.

ramifications depend upon the old law favouring heirs-at-law,[39] but they still govern trusts of land and of money.[40]

Just as conversion depends upon someone to enforce it, so a decision by that person against conversion may prevent conversion or, to be more accurate, may yield a reconversion.

B. Reconversion

In appropriate circumstances, property which had notionally been converted will notionally return to its actual physical condition.

i. Reconversion by Person of Full Age and Absolutely Entitled. A notional conversion effected by a trust for sale may at any moment be ended by a demand from a sole beneficiary, of full age and absolutely entitled, or by a unanimous demand from the whole body of beneficiaries, all of full age and absolutely entitled, that the property should be handed over to them unconverted, and the trust for sale terminated.[41]

Such a decision to reconvert may be indicated by express declaration or by other signification of intention. The onus of showing an intent to reconvert is on the party desiring to effect a reconversion,[42] and an intention to reconvert is more easily established in the case of unsold land held on trust for sale than in the case of money held on trust to invest in land.[43]

ii. Reconversion by Operation of Law. Reconversion may also be effected by operation of law where the trusts on which the property was held have ended or failed, and the property was in the possession of a person absolutely entitled who died without indicating any intention in the matter. Thus in *Re Cook* [44]:

> A freehold house had been conveyed to husband and wife as joint tenants. On January 1, 1926, the house became subject to a statutory trust for sale. In January 1944, H died; and eight months later W died, leaving by her will "all my personal estate" to her nephews and nieces. She was in possession of the house at her death and the question was whether it passed under the gift. Harman J. held that the trust for sale terminated, the house was reconverted into land and did not pass under the will as personal estate.

39 *Ackroyd* v. *Smithson* (1780) 1 Bro.C.C. 503.
40 *Curteis* v. *Wormald* (1878) 10 Ch.D. 172; *Re Richerson* [1892] 1 Ch. 379.
41 *Saunders* v. *Vautier* (1841) Cr. & Ph. 240; Nathan & Marshall, No. 95.
42 *Griesbach* v. *Fremantle* (1853) 17 Beav. 314 at p. 317.
43 *Crabtree* v. *Bramble* (1747) 3 Atk. 680; *Re Pedder's Settlement* (1854) 5 De G.M. & G. 890; *Mutlow* v. *Bigg* (1875) 1 Ch.D. 385; *Re Gordon* (1877) 6 Ch.D. 531.
44 [1948] Ch. 212.

iii. Concurrent Owners and Remaindermen. So far as concurrent owners are concerned, the position depends on the presence or absence of inconvenience to co-beneficiaries: in a trust to buy land, there is no reason why one beneficiary should not receive his share in money, but as land loses value if not sold in one piece, one co-owner of a trust to sell land cannot choose to retain his share as land.[45] A remainderman can do nothing to prevent a conversion save indicate that, if the property is not converted when it becomes his, he would elect not to convert it. This, if events turn out as he hopes, will yield a notional reconversion automatically, provided his interest in remainder was an absolute one, *i.e.*, not, at the time of his death, subject to any contingency.[46]

6. Changing Concept of the Trust for Sale

A. Use of Trusts for Sale as a Method of Settling Property

The early trusts for sale were created with a view to selling land in order to raise money, usually for the payment of debts.[47] It was only in the nineteenth century that trusts for sale *inter vivos* became common, such trusts often including a power in the trustees to postpone sale and to hold the land and the income from the property for the benefit of stated persons until sale, and naming the trusts on which the proceeds of sale were to be held. Such a system had enormous advantages for a settlor who wished to make use of his property for the benefit of his family generally. First, property of all sorts, land, money, securities and chattels can all be lumped together under the trust for sale. Secondly, the trustees who hold the legal estate can retain the land or sell it, according to their view of the best interests of the beneficiaries. Thirdly, and most vital, the trusts affect the income until sale and the proceeds after sale, and *do not affect the land.* Thus a purchaser from the trustees can purchase the land without being bound by the trusts. It was at one time held that the purchaser was obliged to see to the proper application of the purchase-money, and would be liable if it were misapplied by the trustees[48]; but he could be excused by the insertion in the trust of a provision authorising the trustees to give an effective receipt to the purchaser; this provision has been statutory since 1859.[49]

45 *Seeley* v. *Jago* (1717) 1 P.Wms. 389; *Holloway* v. *Radcliffe* (1856) 23 Beav. 163.
46 *Re Sturt* [1922] 1 Ch. 416; Tiley, p. 306, reviewing a rather tangled web of authority; see also (1922) 38 L.Q.R. 261.
47 (1929) 3 C.L.J. 59 (J. M. Lightwood).
48 Vaizey, *The Law of Settlements of Property*, pp. 1409–1412; Cheshire, p. 80.
49 Law of Property Amendment Act 1859, s. 23; now T.A. 1925, s. 14 (1); *ante*, p. 344; see also L.P.A. 1925, ss. 2 (1) (ii) and 27 (1).

A moment's reflection will show the great advantages for conveyancing purposes over a strict settlement of such a system before the Settled Land Act 1882. Until that time, there was no way, without an express power in the settlement or authorisation by the court, in which the land could be sold free from the beneficiaries' interests. The purchaser would have to purchase the interest of each one. In many cases the land was in effect inalienable, as was indeed intended by settlors whose main objective was to establish an entail in a holding of ancestral land,[50] so as to keep it for the longest possible time in the family.[51] The strict settlement was the landowner's settlement; the trust for sale was called the "trader's" settlement. We will return later to the comparative advantages of strict settlements and trusts for sale under the modern law.[52]

B. Settled Land Act 1882

Strict settlements assumed a modern form through the intervention of the Legislature. By the Settled Land Act 1882, a settlement was defined widely as[53] being an instrument whereby "any land . . . stands for the time being limited to or in trust for any persons by way of succession."

The tenant for life of a settlement was given wide powers of selling, leasing, opening and working mines, cutting timber, etc., in the exercise of which powers he was to be regarded as a trustee for those entitled in remainder.[54] The power of sale empowered him to sell the whole fee simple; and on a sale the interests of the beneficiaries left the land and were transferred to the purchase-money. They were "overreached." The purchase-money was to be paid, not to the tenant for life, but to the trustees of the settlement, and to be held by them on trusts corresponding to the interests previously held in the land.[55] Before the sale, the trustees' duties included that of exercising a general supervision over the settled land, and to hold a balance between the tenant for life and the remaindermen for the benefit of the land as a whole. This Act recognised the situation created by the industrial age, and is much more revolutionary in its principles than any of the Acts of 1925. It incorporated a new idea, of complete equality in value between land and money; settled land was no longer to be stagnant and unsaleable, and a settlor wishing to "keep land in the family" could now do so no more effectually

[50] Entails could not be created in personalty until 1926: L.P.A. 1925, s. 130 (1).
[51] M. & W., p. 228; Cheshire, p. 126.
[52] *Post*, p. 523 *et seq.*
[53] S.L.A. 1882, s. 2; S.L.A. 1925, s. 1.
[54] S.L.A. 1882, s. 53; *Middlemas* v. *Stevens* [1901] 1 Ch. 574.
[55] S.L.A. 1882, s. 22 (5).

by the settlement than by the trust for sale. But landowners failed to realise the new trend of events, and between 1882 and 1925, probably as a matter of course, preferred to use the method of strict settlement than the more flexible method of the trust for sale.

7. Trusts for Sale under the Law of Property Act 1925

The framers of the 1925 legislation were fully aware of the importance and possibilities of the trust for sale and made use of it, among other purposes, as an alternative to the strict settlement as a method of effecting a family settlement. Land held on trust for persons in succession must be held either on a strict settlement or on trust for sale; if it is not the one, it is the other.[56] Under a settlement the tenant for life has the legal estate and passes title to the purchaser. With land held on trust for sale the trustees hold the legal estate. A conveyance by a tenant for life or by trustees for sale can overreach the beneficial interests. The provisions as to strict settlements are contained in the Settled Land Act 1925, those as to trusts for sale in the Law of Property Act 1925.[57] The curious thing about the two institutions is that, though quite different in their original objectives, their history and their treatment by the legislature, there is little that can be done by the one that cannot equally well be done by the other.[58]

A. The Definition of Trust for Sale

The definition is contained in section 205 (1) (xxix) of the Law of Property Act 1925:

> ". . . an immediate binding trust for sale, whether or not exercisable at the request or with the consent of any person, and with or without a power at discretion to postpone the sale; . . ."

The weakness of the definition is that it includes the thing to be defined, and, in effect, says that that thing is a particular type of that thing. We must examine the significance of the words "immediate" and "binding," neither of which has, in this connection, its natural meaning.

i. "Immediate." "Immediate" does not mean that the land must be sold at once. The word applies to "trust" and not to "sale." What is meant is an immediate or present (as opposed to future) trust to sell at some time; not a trust to sell immediately. A

[56] S.L.A. 1925, s. 1 (7).
[57] ss. 23–33.
[58] *Post*, p. 523 *et seq.*

power to postpone sale in the trustees' discretion is given by section 25 of the Law of Property Act 1925. Indeed an immediate trust for sale may exist where an immediate sale may be a breach of trust [59]; or where an application to the court to order a sale will be refused on the ground that such an order would be supporting a breach by one of several joint tenants of a contractual obligation.[60]

The meaning of "immediate" is well illustrated by a comparison of *Re Hanson* [61] and *Re Herklot's Will Trusts* [62]:

> In *Re Hanson*,[61] the testator directed his trustees to purchase a dwelling-house for his wife as a residence for herself until either she remarried or her son attained 25 (whichever happened first); the house was then to be held on trust for sale. Astbury J. held that the trust for sale was not "immediate" because it was expressed to arise at the end of a specified period; therefore the land was settled land.
>
> In *Re Herklot's Will Trusts*,[63] the testatrix left the residue of her estate on trust for sale and by a later clause directed that the income should be paid to Miss Gordon for life, with permission to "reside in my . . . house during her life for so long as she wishes." The plaintiff was given a share of the residue, and a codicil provided that the plaintiff could, if he wished, claim the house instead of his share of the residue. Miss Gordon proposed to sell the house.
>
> The question was whether the permission given to Miss Gordon to reside in the house was inconsistent with the existence of a trust for sale during her lifetime. If the house was not subject to a trust for sale, it would be settled land, and Miss Gordon would be tenant for life and would be entitled to sell.[64] If the land were subject to a trust for sale, the codicil could be construed as requiring the consent of the plaintiff to a sale.[65] Ungoed-Thomas J. held that the right of Miss Gordon and of the plaintiff to object to the sale was not inconsistent with there being a trust for sale; the house was held upon an immediate binding trust for sale, but could not be sold without the consent of each.

ii. "Binding." The word "binding" is much more difficult. Who or what is to be bound? Not the beneficiaries, for, as we have

[59] *Re Warren* [1932] 1 Ch. 42; Tiley, p. 214.
[60] *Re Buchanan-Wollaston's Conveyance* [1939] Ch. 738.
[61] [1928] Ch. 96.
[62] [1964] 1 W.L.R. 583.
[63] [1964] 1 W.L.R. 583.
[64] No restrictions may be placed upon the power of sale of a tenant for life of settled land: S.L.A. 1925, s. 106.
[65] *Post*, p. 521.

seen, if all are of full age and absolutely entitled they can unanimously decide to put an end to the trust. The simplest and most obvious explanation of the word would have been to have taken it as meaning that the trustees are bound at some time, though possibly in the remote future, to sell; or to put it another way, that the word refers to the estate in the land held by the trustees. But this was not the view taken by Tomlin J. in *Re Leigh's Settled Estates* (*No.* 1).[66] He read the word as referring to the binding effect of the trust for sale upon the interests of persons beneficially interested in the land; so that "there is no immediate binding trust for sale so long as there is not a trust for sale which is capable of overriding all charges having under the settlement priority to the trust for sale."[67]

> In *Re Leigh's Settled Estates*,[66] a tenant in tail of land which was subject to an equitable rent charge, disentailed and conveyed it, still subject to the charge, to trustees on trust for sale. The question was whether the trustees held the land subject to "an immediate binding trust for sale." A sale by those trustees would not have overreached the prior equitable charge, and Tomlin J. held that it was not therefore a binding trust for sale; it therefore remained settled land.

If the trust for sale had been an *ad hoc* trust for sale, a sale by the trustees would have been able to overreach interests prior to the trust for sale.[68] Such was the situation in *Re Leigh's Settled Estates* (*No.* 2) [69] and Tomlin J. then upheld the trust for sale.

This restricted view of the scope of the ordinary trust for sale seems to be contrary to the general purport of the legislation of 1925 and 1926. A more generous view was taken by the Court of Appeal in *Re Ryder and Steadman's Contract* [70] but this was a case of land held in undivided shares, where, as we have seen, a statutory trust for sale arises. It has no direct effect, therefore, on the authority of *Re Leigh's Settled Estates*,[71] though it is very difficult to reconcile the reasoning of the two decisions. Romer J. in *Re Parker's Settled Estates*,[72] expressed disapproval of the wide test applied in *Re Leigh's Settled Estates*,[71] discarded the reference to "overreaching," and laid down as the test: whether "the whole legal estate which is the subject-matter of the settlement is subjected

66 [1926] Ch. 852.
67 [1926] Ch. at p. 859.
68 *Post*, p. 518. To obtain the additional overreaching powers, it is necessary for the trustees to be approved or appointed by the court or to be a trust corporation: L.P.A. 1925, s. 2 (2); *post*, p. 519.
69 [1927] 2 Ch. 13.
70 [1927] 2 Ch. 62.
71 [1926] Ch. 852; [1927] 2 Ch. 13.
72 [1928] Ch. 247; see (1928) 65 L.J.Newsp. 248 at pp. 272, 293 (J. M. L.).

to a trust for sale? "[73] In *Re Parker's Settled Estates*[72] he found that his own test was not satisfied because there was outstanding a *legal* term of years[74]; and this made it impossible to say that the whole legal estate which had been the subject-matter of the settlement was held on trust for sale.

In *Re Norton*,[75] lands stood limited to Lord Norton for life, and after his death, subject to certain equitable charges, to trustees on trust for sale. On Lord Norton's death, probate was granted of the settled land to his special representatives. They therefore held the legal estate. The trustees for sale demanded a conveyance of the legal estate according to the terms of the settlement. *If the legal estate had been conveyed to the trustees for sale* there would have been a "binding" trust for sale, according to Romer J.'s test, but not according to Tomlin J.'s test. But the legal estate had not yet been conveyed by vesting assent by the special representatives. Could the trustees for sale compel a conveyance? No; because a conveyance could only be compelled if section 7 (5) of the Settled Land Act were complied with, that is to say, if the claimants have become absolutely entitled to the settled land free from all charges taking effect under the settlement.[76] The equitable charges thus had effect in this case, not to prevent a legal estate in the hands of trustees for sale being held upon a binding trust for sale, but to deny the trustees for sale the right to demand the legal estate. A similar situation arose in *Re Sharpe's Deed of Release*,[77] where, however, the special representatives and the trustees for sale were the same persons. Morton J. held that they did not hold the land in their capacity as trustees for sale unless and until they signed an assent in favour of themselves to that effect.

These decisions have had the effect of narrowing the definition of trust for sale more strictly than the profession would have expected in 1926. This may not be very serious, although it will be submitted later that the machinery of a trust for sale is preferable to that of a settlement and should therefore be preferred whenever

[73] *Ibid.* at p. 263.
[74] For raising portions.
[75] [1929] 1 Ch. 84; (1929) 67 L.J.Newsp. 24 at p. 44 (J. M. L.).
[76] "If any person of full age becomes absolutely entitled to the settled land (whether beneficially, or as personal representative, or as trustee for sale, or otherwise) free from all limitations, powers, and charges taking effect under the settlement, he shall be entitled to require the trustees of the settlement, personal representatives, or other persons in whom the settled land is vested, to convey the land to him, and if more persons than one being of full age become so entitled to the settled land they shall be entitled to require such persons as aforesaid to convey the land to them as joint tenants."
[77] [1939] Ch. 51.

possible. The most serious aspect of the problem of defining an immediate and binding trust for sale is that the present position creates uncertainty. Since the legal estate is in the tenant for life under a settlement, and in the trustees under a trust for sale, this uncertainty leaves a purchaser in doubt as to the identity of the holder of the legal estate. This is inexcusable; and is a strong argument in favour of the reduction of the methods of settling land to one only. In practice the problem can often be solved if both parties wish to go through with a contract of sale, by arranging for the purchaser to take a conveyance from both possible legal estate holders.[78]

B. Overreaching

i. By Ordinary Trust for Sale. It was explained above that the beneficial interests under a trust for sale are in the notional or, on sale, the actual proceeds of sale, and in the income of the land until sale. A purchaser is not therefore concerned with the beneficial interests under a trust for sale. This principle is now laid down in statutory form.[79] It was noted also that a similar principle was introduced in the case of strict settlements under the Settled Land Act 1882 under which a conveyance by a tenant for life, following the correct statutory machinery, was, by statute, given an overreaching effect.

It has long been the practice (but never compulsory) to create a trust for sale by two separate deeds. The first conveyed the property to the trustees to hold on trust for sale and to hold the proceeds of sale upon the trusts set out in the other instrument, the trust instrument. It also gave the trustees the power to give a receipt for the purchase-money. An intending purchaser would examine this deed which formed part of the title to the legal estate. He would know that there were trusts under which beneficiaries were interested, but these trusts were fixed upon the purchase-money and not upon the land.[80] It is to everyone's convenience to hide the details of the trusts when the purchaser is not affected by them. The purchaser is saved the labour of examining matters with which he is not concerned; and the beneficiaries prefer to keep confidential their own private incomes and family affairs. This practice is the model for the "curtain provisions" of the Settled Land Act 1925.

ii. By Ad Hoc Trust for Sale. It is only the interests under the trust for sale which are overreached in this way. But where the land

[78] See (1929) 67 L.J.Newsp. 24 (J. M. L.).
[79] L.P.A. 1925, s. 2 (1).
[80] (1942) 8 C.L.J. 36 (S. J. Bailey).

which is subject to a trust for sale is subject to existing interests and charges which have priority to the trust for sale, it is often convenient to enable trustees on a sale to overreach these as well. Section 2 (2) of the Law of Property Act 1925 [81] provides for the creation of *ad hoc* trusts for sale for this purpose. Where trustees for sale are either two or more individuals approved or appointed by the court [82] or a trust corporation, any equitable interest or power having priority to the trust for sale can be overreached by a conveyance and take effect against the proceeds of sale according to its priority.

The principle of overreaching, however, applies only to those interests which can properly and conveniently be converted into money. With strict settlements and with trusts for sale there are some interests which can never be overreached. Prior legal estates and interests such as leases, easements and legal mortgages come within this category, as do some equitable interests. Those which are excepted from the overreaching provisions are the following:

(i) Any equitable interest protected by a deposit of documents relating to the legal estate affected;

(ii) The benefit of any covenant or agreement restrictive of the user of land;

(iii) Any easement, liberty, or privilege over or affecting land and being merely an equitable interest (an equitable easement);

(iv) The benefit of any contract to convey or create a legal estate (an estate contract);

(v) Any equitable interest protected by registration under the Land Charges Act 1925, other than—

(*a*) an annuity within the meaning of Part II of the Land Charges Act 1925;

(*b*) a limited owner's charge or a general equitable charge within the meaning of the Land Charges Act 1925.

C. Powers of Trustees for Sale

i. Postponement of Sale. It has been seen that a trust for sale would originally be created with a view to the early sale of the land, and that the insertion in the powers of the trustees of a power to postpone sale has been one factor in enabling trusts for sale to be used as machinery for effecting family dispositions in the place of a strict settlement. A power to postpone sale is now implied in the case of every trust for sale unless a contrary intention appears.[83]

[81] As amended by L.P.(A.)A. 1926. The land could of course be sold subject to the other interests and charges; or the holders of them may be willing to release.
[82] Or the successors in office of the individual so appointed or approved.
[83] L.P.A. 1925, s. 25 (1).

The decision to postpone must be the decision of the trustees as a whole. If they disagree, they are not exercising the power to postpone, and the sale will go ahead according to the terms of the trust.[84] Those desiring a sale should make application to the court under Law of Property Act 1925, s. 30.[85]

The power to postpone may be excluded by the expression of a contrary intention, as where the testator directed his trustees to sell his farm "as soon as possible."[86]

ii. Management and Sale. Before 1926, trustees for sale had no powers of management except those which were expressly conferred by the trust instrument, and, of course, the power to sell. The Law of Property Act 1925 brought trusts for sale into line with settled land by giving to trustees for sale all the powers of a tenant for life and trustees of a settlement.[87] So long as trustees for sale retain some land (thus maintaining their position as trustees for sale[88]) they may apply the proceeds of sale of land held upon trust for sale in the purchase of land.[89]

Section 28 also lets in the powers conferred by section 64 of the Settled Land Act 1925, under which the court can sanction any transaction affecting the land which in the opinion of the court would be for the benefit of the land or the persons interested in it. This was the widest of the jurisdictions to vary the terms of trusts until the Variation of Trusts Act 1958[90] and could be used with a view to obtaining fiscal advantages for the trust.[91]

iii. Delegation. Section 29 empowers the trustees to delegate the powers of leasing and management revocably and in writing to any person of full age who is beneficially entitled in possession to the net rents and profits of the land for his life. Where this is done, a settlement by way of trust for sale can be managed internally by the current tenant for life, as is the case with a strict settlement. The legal estate however remains with the trustees and they alone

[84] *Re Roth* (1896) 74 L.T. 50; *Re Hilton* [1909] 2 Ch. 548; *Re Mayo* [1943] Ch. 302; *Bull* v. *Bull* [1955] 1 Q.B. 234; *Jones* v. *Challenger* [1961] 1 Q.B. 176; *Rawlings* v. *Rawlings* [1964] P. 398.

[85] *Post*, p. 522.

[86] *Re Rooke* [1953] Ch. 716.

[87] L.P.A. 1925, s. 28 (1).

[88] *Re Wakeman* [1945] Ch. 177. This point was expressly reserved by Cohen L.J. in *Re Wellsted's W.T.* [1949] Ch. 296 at p. 319.

[89] *Re Wellsted's W.T.* [1949] Ch. 296. It is wise to insert an express power to this effect. If the only land held is the family house and this is sold, the trustees relying on their statutory powers will be unable to apply the proceeds of sale in purchasing another one.

[90] *Ante*, pp. 384, 386.

[91] *Re Simmons* [1956] Ch. 125.

can convey the fee simple; this is the essence of the trust. Delegation of powers in this way is a more satisfactory situation than that of a strict settlement where they are inevitably with the tenant for life; for the delegation is revocable and can continue so long as the tenant for life is a suitable person to exercise them. If he becomes hostile or malicious, or merely unbusinesslike, the delegation can be revoked.[92]

iv. Reduction or Exclusion of Powers. There is no provision, as there is with settled land,[93] to the effect that any restriction upon the statutory powers of trustees for sale is void. Certainly, as has been seen, the powers of sale can be restricted by requiring that certain consents shall be required for a sale; and some of the powers (*e.g.*, the power to postpone: section 25) are subject to a contrary intention. Apart from these cases, however, it seems that the powers of trustees for sale are, like those of a tenant for life, indefeasible. It may be argued that section 28 of the Law of Property Act 1925 gives to trustees for sale the powers of the tenant for life which are themselves made indefeasible by Settled Land Act 1925, s. 106. Further, the indefeasibility of the powers is consistent with the general policy of the 1925 legislation, and more specifically with that of treating settlements and trusts for sale as alternative methods of achieving similar results.[94]

v. Consent to Exercise Powers. The statutory or other powers vested in trustees for sale (including the power of sale) may, however, be made exercisable only with the consent of any persons.[95] However, if the consent of more than two is stated to be required, then, in favour of a purchaser,[96] the consent of any two shall be deemed sufficient[97]; and where the person whose consent is required is not *sui juris* or becomes subject to disability, his consent, in favour of a purchaser, shall not be deemed to be required.[98] The trustees should always obtain such consent before exercising their powers: from the parent or guardian in the case of an infant, and from the receiver in the case of a mental patient.[98]

[92] For the difficulties involved in depriving a tenant for life of his Settled Land Act powers, see *Re Thornhill's Settlement* [1941] Ch. 24; S.L.A. 1925, s. 24 (1).
[93] S.L.A. 1925, s. 106.
[94] See *Re Davies W.T.* [1932] 1 Ch. 530; *Re Wellsted's W.T.* [1949] Ch. 296 at p. 312; M. & W., p. 377.
[95] And if they refuse to give their consent, any person interested may apply to the court for an order for sale: L.P.A. 1925, s. 30; *post*, p. 522; *Re Beale's Settlement Trusts* [1932] 2 Ch. 15.
[96] Defined L.P.A. 1925, s. 205 (1) (xxi).
[97] L.P.A. 1925, s. 26 (1). Sale without obtaining the necessary consents is a breach of trust.
[98] L.P.A. 1925, s. 26 (2), as amended by the Mental Health Act 1959, s. 149, Sched. 7.

The consent of a beneficiary in possession is often required for the purpose of a sale by trustees for sale. The addition of other consents may in effect make the land inalienable.

In *Re Inns* [99] a testator left his house on trust for sale, giving a life interest to his widow, and, if the house was not sold at her death, to the Stevenage Urban District Council; and providing that the house should only be sold with the consent both of the widow and of the Urban District Council. There could be no circumstances in which it would be in the interests both of the widow and of the Urban District Council to sell the house, and the requirements of the dual consent meant that the land would not be sold; but no doubt was cast upon the validity of the consents.

vi. Consultation of the Beneficiaries. Under a statutory trust for sale,[1] it is the duty of the trustees, so far as practicable, to consult the persons of full age for the time being beneficially interested in possession in the rents and profits of the land until sale, and, so far as is consistent with the general intent of the trust, to give effect to the wishes of such persons, or in the case of a dispute, of the majority.[2] A purchaser is not however concerned to see that this provision has been complied with.[2]

This provision does not apply to express trusts for sale unless the instrument expressly so provides. There, the settlor has freedom to decide whether decisions upon the exercise of the trustees' powers shall be left entirely to the discretion of the trustees or whether they shall be guided by the wishes of the beneficiaries. As has been seen the trustees, subject to contrary provisions, may postpone a sale [3]; but, unless they all agree to do so, they must sell.[4]

vii. Failure to Exercise Trustees' Powers. If the trustees for sale refuse to sell or to exercise any of the powers conferred on them by sections 28 and 29, or if a requisite consent to a sale cannot be obtained, any person interested [5] may apply to the court for an order directing the trustees to act accordingly, and the court has power to make such order as it thinks fit.[6]

[99] [1947] Ch. 576; *Re Herklot's W.T.* [1964] 1 W.L.R. 583.
[1] L.P.A. 1925, s. 35; *ante*, p. 507.
[2] L.P.A. 1925, s. 26 (3), as amended by L.P.(A.)A. 1926, Sched.
[3] L.P.A. 1925, s. 25; *ante*, p. 519.
[4] *Ante*, p. 520.
[5] See *Stevens* v. *Hutchinson* [1953] Ch. 299; *Re Solomon* [1967] Ch. 573.
[6] L.P.A. 1925, s. 30; *Re Buchanan-Wollaston's Conveyance* [1939] Ch. 738; *Re Mayo* [1943] Ch. 302; *ante*, p. 520; *Re Hyde's Conveyance* (1952) 102 L.J. Newsp. 58; *Bull* v. *Bull* [1955] 1 Q.B. 234; *Jones* v. *Challenger* [1961] 1 Q.B. 176; *Rawlings* v. *Rawlings* [1964] P. 398; *Re Solomon* [1967] Ch. 573.

8. Comparison Between Trust for Sale and Strict Settlement as Methods of Settling Family Property

Although settlements and trusts for sale originate with opposite objectives—the one to retain the land, the other to sell it—the two institutions have developed into alternative methods of effecting family settlements. It is thus a matter of interest and importance to consider which is the better method, and, if one is better than the other, whether there is good reason to retain both. The two methods are exclusive; successive interests in land must exist either under a trust for sale or under a strict settlement, and the two cannot exist at the same time.[7]

There are many relevant arguments on technical details for which there is no room here; and many of these are inconclusive on the general issue for they depend upon points of draftsmanship or construction[8]; and advantages now held to exist in favour of the one method or the other could, generally speaking, be made applicable to either. The conclusion will be that the trust for sale is the better method.

A. Strict Settlement

The main argument usually put forward in favour of the strict settlement is that the tenant for life is usually the head of the family, that he should have vested in himself the legal estate and the statutory powers of management, the responsibility for personal supervision and for decisions concerning sale. This is the concept of the landlord of hereditary acres wishing to be "master in his own house."[9] Indeed, why should he not be, if he so wishes? This situation is very different from the one, much deplored, of the unintentionally created settlement where a small householder has by his will left his cottage to his wife for life and then to the children.[10] However, the provisions of sections 28 and 29 of the Law of Property Act 1925[11] mean that the person entitled for life may be enabled to exercise these powers. It is questionable whether in modern conditions the difference between this situation and that of a tenant for life *entitled* to the powers is important. And the revocable delegation enables the trustees to resume control if the tenant for life's management is unsatisfactory.

[7] S.L.A. 1925, s. 1 (7).
[8] See (1944) 8 Conv.(N.S.) 147 (H. Potter); [1957] C.L.P. 152 (E. H. Scammell); [1962] C.L.P. 194 (E. C. Ryder).
[9] M. & W., p. 392; (1944) 8 Conv.(N.S.) 147 (H. Potter).
[10] (1938) 85 L.J.Newsp. 355 at p. 356 (J. M. L.).
[11] Giving to trustees for sale all the powers of a tenant for life and permitting those powers to be revocably delegated to a person of full age entitled in possession to the net rents and profits: *ante*, p. 520.

Certain fiscal advantages favour a strict settlement. The tenant for life is able to obtain tax reliefs in respect of expenses for certain improvements and may direct the trustees to refund to him out of capital the expenses of the improvements.[12] Persons entitled to the rents and profits under a trust for sale cannot demand such payment from the trustees out of capital.[13] Further, estate duty payable in respect of realty may be paid in instalments over a period of eight years, the interest on the sums outstanding being only 2 per cent. from the expiration of twelve months from the death.[14] For this purpose, land held under a statutory trust for sale is treated as land,[15] but land held under an express trust for sale is treated as personalty.[16] The reduced rate of estate duty in respect of agricultural property [17] is applicable both to settled land and to land held upon trust for sale.[18]

The overreaching effect of a conveyance by a tenant for life under a settlement is more extensive than that of a trust for sale, and includes (even if registered) an annuity within the meaning of Part II of the Land Charges Act 1925, a limited owner's charge or a general equitable charge within the meaning of the Act.[19] There is no distinction between the overreaching effect of an *ad hoc* settlement and an *ad hoc* trust for sale.[20]

B. Trust for Sale

There are several advantages of a trust for sale. First, there is the negative argument that anything that can be achieved by a settlement can be achieved as well or better by a trust for sale. If the powers of management have been delegated, the life tenant's position is in practice very similar to that of a tenant for life under a settlement. But there is the safeguard that if he should prove incompetent the trustee for sale can revoke the delegation and take over. The danger of mala fide use of the power [21] or of conscious neglect of the property [22] is much reduced. The conflict of interest of the tenant for life can be avoided with a trust for sale.[23]

12 S.L.A., s. 75 (2).
13 *Re Wynn* [1955] 2 All E.R. 865; Agricultural Holdings Act 1948, s. 81.
14 F.A. 1943, s. 27.
15 L.P.A. 1925, s. 16 (4); A.E.A. 1925, s. 53 (3) (*c*).
16 See *Re Wheeler* [1929] 2 K.B. 81n.
17 F.A. 1894, s. 22 (1) (*g*); F.A. 1925, s. 23 (4); F.A. 1949, s. 28 (1).
18 Dymond, p. 639.
19 S.L.A. 1925, s. 72 (2); L.P.A. 1925, s. 2 (1) (ii).
20 S.L.A. 1925, s. 21 (2); L.P.A. 1925, s. 2 (2) (3).
21 *Wheelwright* v. *Walker* (1883) 23 Ch.D. 752; *Middlemas* v. *Stevens* [1901] 1 Ch. 574.
22 *Re Thornhill's Settlement* [1941] Ch. 24.
23 [1957] C.L.P. 152 (E. H. Scammell).

Secondly, the documentation of a trust for sale is cheaper and less complicated. There is little difference in respect of the setting up of the trusts; but on the death of a tenant for life under a settlement, a separate grant of probate must be taken out limited to settled land, and a vesting instrument prepared which vests the legal estate in the new tenant for life.[24] This problem is real only in relation to small estates, where the creation of the settlement is often unintentional.[25] Complications can exist whichever method is used, but doubts and uncertainty are more likely to arise with a settlement than with a trust for sale.[26]

Thirdly, a settlor who wishes to control the future disposition of the property can do so more effectively with a trust for sale by means of a requirement that certain persons must consent to a sale. We saw that, in favour of a purchaser, only two consents may be imposed[27]; but if the consent of the person currently entitled to the income and that of the remainderman is required, the settlor can be sure that a sale is made only in accordance with the wishes of the chief beneficiaries. A similar control could be effected by making them trustees. On the other hand, no restriction may be imposed upon the free exercise of his powers by a tenant for life under a settlement.[28]

Fourthly, a trust for sale may include property of all sorts, including land. A settlement is applicable to land only.[29] A settlor who wishes to create a family trust of mixed property and wishes to establish a strict settlement of the land, must set up a separate trust of the personalty.

Fifthly, a trust for sale is more convenient where the settlor wishes to give the property equally between the children, who can be given concurrent interests in the land. Indeed, as has been seen, a gift of concurrent interests is one of the circumstances for the imposition of a statutory trust for sale.[30] Although joint tenants for life are occasionally found in strict settlements,[31] the system assumes control by one individual, in accordance with the tradition established by the rules of primogeniture. However, if a settlor wants a succession based on primogeniture, and including a succession of entailed interests,[32] he may do so under a trust for sale.

[24] A.E.A. 1925, s. 22; S.L.A. 1925, s. 6.
[25] (1938) 85 L.J.Newsp. 355.
[26] (1944) 8 Conv.(N.S.) 147 (H. Potter); [1962] C.L.P. 194 (E. C. Ryder).
[27] L.P.A. 1925, s. 26.
[28] S.L.A. 1925, s. 106.
[29] But personalty may be settled so as to follow the same trusts as to land: L.P.A. 1925, s. 130 (1).
[30] L.P.A. 1925, ss. 34, 36; S.L.A. 1925, s. 36.
[31] S.L.A. 1925, s. 19 (2).
[32] L.P.A. 1925, s. 130.

Sixthly, a trust for sale, being much more adaptable, is a more satisfactory method of creating a discretionary trust.[33] It is true that a discretionary trust may be forced into the structure of the Settled Land Act.[34] Since one of the main arguments in favour of a strict settlement is that the tenant for life can control the land, and since a discretionary trust necessarily has no tenant for life,[35] a discretionary strict settlement is a strange mixture. We saw that the supporters of strict settlements press their advantages in relation to large settlements, and accept that settlements, usually unintentional, of small estates are unsatisfactory; and we have also seen that most trusts of any size have recently been created as discretionary trusts because of the fiscal and other advantages [36]; therefore, if large strict settlements fit less satisfactorily than trusts for sale into the context of discretionary trusts, there cannot be many occasions on which a strict settlement is the more suitable.

C. Suggested Solution

Various suggestions have been made to meet this situation. In 1938 [37] Professor Lewis thought that it would be too drastic to recommend the total abolition of strict settlements and convert them into trusts for sale. He suggested that an amendment to the Act, vesting the legal estate in settled land in the trustees of the settlement, would meet the situation. This at least would avoid the uncertainties which arise at present where it is uncertain whether a settlement or trust for sale exists.[38] Professor Potter,[39] supporting strict settlements in their proper context, would limit them to cases where there was evidence of an intention to create a settlement; and would restrict the tenant for life's power of sale by permitting a requirement of consent to be imposed. Professor Scammell [40] would repeal the Act, and convert all settlements into trusts for sale.

It is submitted that Professor Scammell is right. The other two solutions would reduce but not solve the problem. Professor Lewis' solution, as he admits, would constitute an exception to the principle of the 1925 legislation that the estate owner in whom the legal estate is vested should be the person to dispose of it. Further it would not deal with a case like *Re Norton*,[41] where the legal estate was in the

[33] *Ante*, p. 180 *et seq.*
[34] Maudsley & Burn, pp. 130–141.
[35] *Re Gallenga W.T.* [1938] 1 All E.R. 106.
[36] *Ante*, p. 181. See, however, F.A. 1969, ss. 36 (2), 37 (3).
[37] (1938) 54 L.Q.R. 576 (M. M. Lewis).
[38] *Ante*, p. 518; (1928) 65 L.J.Newsp. 272–273.
[39] (1944) 8 Conv.(N.S.) 147 (Harold Potter).
[40] [1957] C.L.P. 152.
[41] [1929] 1 Ch. 84; *ante*, p. 517.

trustees of the settlement (the special representatives of the deceased tenant for life) and the question was whether it should be in the trustees for sale. Professor Potter would leave unanswered all the questions which arise where it is not clear whether a settlement or trust for sale exists. These uncertainties are inexcusable; if the law offers two alternatives, it should be absolutely clear which one exists in any case. Further, it is difficult to see, with increasingly burdensome taxation, how the old system of successive interests, including entails, which are the basis of the standard form of strict settlement, can have useful existence much longer. For those few who still desire such a family settlement, the same effect, perhaps better because of the permitted restrictions on sale, can be achieved by a trust for sale. It seems therefore that one method only should exist. Of the two, the trust for sale, because of its adaptability, its suitability for discretionary trusts, for mixed funds, for co-ownership [42] and for intestates' estates,[43] must be the one which is chosen.

9. Termination of Trusts for Sale

A trust for sale, once established, continues until the beneficial interests are worked out; or until the beneficiaries, being of full age and absolutely entitled, put an end to the trust by directing a conveyance of the legal estate [44]; or until one trustee is left to hold the land on trust for himself.[45]

Terminating events may thus occur by reason of events relating to the beneficial interests. A purchaser is not concerned with beneficial interests, nor is he affected by them. It would be unsatisfactory to make the purchaser responsible for discovering whether the trust for sale has terminated, and section 23 of the Law of Property Act 1925 provides that, so far as the protection of a purchaser is concerned, a trust for sale, once established, shall be deemed to be still subsisting until the land has been conveyed to or under the directions of the persons interested in the proceeds of sale. Unless the trustees for sale have made such a conveyance, the purchaser must take title from the trustees for sale, and must pay the purchase money to them, being not less than two in number or a trust corporation.[46]

A difficulty arises where trustees for sale hold land upon trust for themselves jointly and they become reduced in number to a single person. This will normally happen where a husband and wife

[42] L.P.A. 1925, ss. 34–36.
[43] A.E.A. 1925, s. 47.
[44] L.P.A. 1925, s. 23.
[45] *Re Cook* [1948] Ch. 212.
[46] L.P.A. 1925, s. 27 (2).

are entitled jointly and one spouse dies. The survivor is then left as sole holder of the legal estate and solely entitled beneficially. Such a situation arose in *Re Cook* [45] discussed above.[47] A purchaser from the survivor of joint tenants would not be safe to take a conveyance. There is nothing to show that the trust for sale had terminated. One joint tenant has died, and the purchaser knows that; but he does not know that there had not been a severance of the beneficial joint tenancy [48] before the death. And if the trust for sale continues, the purchaser must pay the purchase money to at least two trustees. The Law of Property (Amendment) Act 1926 dealt with the problem by enacting that "Nothing in this Act affects the right of a survivor of joint tenants, who is solely and beneficially interested, to deal with his legal estate as if it were not held on trust for sale." [49]

This however was still not satisfactory because it was impossible for the survivor to prove that he was "solely and beneficially entitled" unless he could establish the negative proposition that there had never been a severance. The Law of Property (Joint Tenants) Act 1964 provides that, unless a memorandum of severance has been endorsed on or annexed to the conveyance to the joint tenants, or certain bankruptcy proceedings have been taken against the survivor, a survivor of two or more joint tenants shall in favour of a purchaser of the legal estate be deemed to be solely and beneficially interested if he conveys as beneficial owner or if the conveyance to the purchaser contains a statement that he is so interested.[50]

[47] *Ante*, p. 511.
[48] L.P.A. 1925, s. 36 (1). *Cf. Caunce* v. *Caunce* [1969] 1 W.L.R. 286.
[49] L.P.(A.)A. 1926, Sched. The amendment is added to L.P.A. 1925, s. 36 (2).
[50] s. 1. The Act is retrospective to January 1, 1926, and provides (s. 2) that in its application to a conveyance executed before the passing of the Act a statement signed by the vendor that he was solely and beneficially interested shall be treated as if it had been included in the conveyance.

CHAPTER 29

MORTGAGES

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1. General

A MORTGAGE of land is a charge upon the land as a security for the payment of a debt or the discharge of some other obligation for which the security is given.[1] An ordinary lender of money may sue the debtor on the contract to recover what is due; and this is the only remedy he needs so long as the debtor is able to pay. If the debtor cannot pay all his debts, and is, in other words, insolvent, his creditors will have to be satisfied with sharing out the money available, each receiving a fair share of what is owed.

[1] Lindley M.R. in *Santley* v. *Wilde* [1899] 2 Ch. 474 said at p. 474: "a mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given." The definition in the text has been adjusted so as to emphasise the concept of a mortgage as a charge instead of a conveyance.

If, however, a creditor is given security for the repayment of his debt by a charge on a piece of property in favour of that creditor he becomes a secured creditor and is able to require the property charged to be applied towards the payment of his debt. So long as that piece of property remains worth as much as the debt owed (plus interest on that debt and costs) a secured creditor will receive payment in full, and will not be affected by an insolvency. But if the property charged becomes worth less than the sum owing, the creditor will only be a secured creditor to the extent of the value of that property; and he must take his share with the unsecured creditors for the remainder of the money owed to him.

Generally speaking, any property, real or personal, in possession, in remainder or in reversion, or a chose in action, may be given as a security. The charge upon the property must, of course, be created in whatever way is appropriate to the type of property in question.[2] Once a mortgage is created, the mortgagee's rights and the proper mode of exercising them are also dependent upon the nature of the property.

Mortgages of all forms of property are common in many aspects of modern society. Sometimes they indicate that the mortgagor is in need of money, and is compelled to mortgage his property to raise it. This is the typical example of a mortgagor in fiction, and in many people's imagination. Not all mortgagors are in need of money, as we shall see; many of them find it more profitable to make use of borrowed money. The typical example in present-day society of the "small man" who is in need of a loan of money for the essentials of life is the purchaser of a house through a building society.[3]

Building societies are a special kind of mortgagee, and are governed by statutes going back to 1874.[4] Their general mode of operation is to borrow money from the general public, at interest, and to use that money by making advances to house purchasers on the security of the house. The mortgage is paid off by monthly payments at a rate which covers outstanding interest and an element of capital repayment, so that the capital is paid off over an agreed period of time, commonly twenty years.

Mortgagors are all borrowers, but, as we have said, many of them are people who can afford to find the money from their own resources, but for one reason or another prefer to borrow. For example, a mortgagor may need money for a short period of time—as where he is buying a new house and incurs expenses in the purchase before

[2] *Post*, p. 534 *et seq.*
[3] *Post*, p. 563.
[4] Building Societies Acts 1874–1962; Waldock, Chap. 4; Wurtzburg, *Building Society Law* (12th ed., 1964).

he receives the money due on his old house—and does not wish to disturb any of his investments. Again, a borrower may calculate that he can make more money from the use of the borrowed money than the loan costs him in interest. He will usually pay in interest something more than the net rate of return on his investments; but if he can make capital profits sufficient to offset this, the loan will be to him an advantage. In these calculations, he must take into account the income tax and surtax which he will pay on dividends received from the investments he makes, and the capital gains tax from the gains. Before 1969 he was able to set off the interest charged against his income for both income tax and surtax assessments.[4a] Thus the profit and loss of such an operation will depend upon these calculations and especially upon the success of the borrower's investment policy. In the 1950s, speaking generally, it was to the advantage of persons to borrow money at the low rate of interest then in force, and invest in a booming stock market on which there was no capital gains tax. In the 1960s borrowing, again speaking generally, has been more expensive; banks, because of Government restrictions, have been less willing to lend; substantial capital profits have been made in the past two years, but capital gains tax has been chargeable on gains made since 1965.[5]

Much of this is obvious. It is however important to understand that mortgagors are not typically the helpless victims of unscrupulous mortgagees, as they were assumed to be in the days when much of the case-law on this subject was developing. "Necessitous men," said Lord Henley, speaking of mortgagors generally, "are not, truly speaking, free men, but to answer a present exigency will submit to any terms that the crafty may impose upon them."[6] Such situations are happily rare.[7] The social problem of the present day is that of the householder who, having become behindhand with his building society payments, is in danger of losing his home, and has no other possible mortgagee to turn to. This is serious enough; but it is not the problem of the grasping mortgagor upon which much of the case-law in this field is based.[8]

Finally it should be noted that a legal first mortgage of freehold land has for centuries been an approved investment for trust money.[9] Trustees are now permitted also to invest in leasehold securities of

[4a] See Finance Act 1969, s. 18, disallowing interest as a deduction for tax purposes except in specified cases (s. 19) which include loans for the purchase of land or for the improvement or development of land.
[5] See F.A. 1965, Parts II and III.
[6] In *Vernon* v. *Bethell* (1762) 2 Eden 110 at p. 113.
[7] See, however, *Cityland and Property (Holdings) Ltd.* v. *Dabrah* [1968] Ch. 166; *post*, p. 546.
[8] *Post*, p. 545 *et seq.*
[9] T.A. 1925, s. 1 (1) (*b*); *ante*, p. 317.

which the unexpired term at the time of the investment is not less than sixty years.[10] Such mortgages were and still are very safe investments and have become all the safer because of the great increase of land values in recent years. Mortgages have however the disadvantage, like many other fixed interest investments, that the capital sum invested is only a " paper " figure, and will lose its actual value because of the inflationary processes of modern society. An investment of £10,000 on a mortgage of freehold land which is valued at £100,000 and is increasing in value is a secure investment. But if the value of money is halved by inflation, the £10,000 remains at the same figure, and is consequently halved in real value. Trustees, as explained above, must try to provide a reasonable income from the trust and conserve the capital of the trust property.[11] One half of the trust fund is required, in the absence of special investment powers, to be invested in narrower range securities, on which there is no substantial opportunity for capital appreciation.[12] There is no reason to suppose that an investment on the security of a first mortgage of freehold land is any worse as an investment than other fixed interest stocks. It is however more expensive to create,[13] and more cumbersome to operate than investments in the gilt-edged market.

We are concerned here only with mortgages of land, for it is in that context that the influence of equity has been most effective. The following discussion will concentrate upon the part played by the doctrines of equity in developing the modern law of mortgages. Other aspects of the law of mortgages have to be explained in order to make equity's contribution comprehensible. Textbooks on mortgages and on land law will give further coverage of aspects of the law of mortgages which are omitted here.[14]

2. The Right to Redeem and the Equity of Redemption

At common law,[15] a legal mortgage was effected by a conveyance by the mortgagor of his whole estate to the mortgagee, subject to a condition that the mortgagee would reconvey it to the mortgagor on repayment of the principal money and interest due upon a loan at a stated time, usually six months later. At the expiration of the

[10] T.I.A. 1961, Sched. 1, Part II, para. 13.
[11] *Ante*, pp. 314–317.
[12] T.I.A. 1961, s. 2; *ante*, p. 318.
[13] Usually borne however by the borrower.
[14] Waldock; Fisher and Lightwood, *Law of Mortgages* (7th ed.); Coote, *Law of Mortgages* (9th ed.); Cheshire, Part III, Chap. 5; M. and W., Chap. 14; Megarry's *Manual*, Chap. 14; Maudsley and Burn, Chap. 9; Rudden and Moseley, *An Outline of the Law of Mortgages*.
[15] Holdsworth, *H.E.L.* ii, p. 336; iii, pp. 128–132.

six months, the mortgagor thus had a legal or contractual right to redeem the mortgage and to a reconveyance of the land; but if he let that moment pass, the mortgagee became the absolute owner of the land; while the mortgagor remained liable for the debt.[16]

This situation could cause great injustice. Equity regarded a mortgage as a security for money lent, and insisted that, if the mortgagor repaid everything that was due under the mortgage—even though the contractual date for redemption had passed—he should be allowed to redeem, and to recover his legal estate. This is the equitable right to redeem. Thus, by the contract, the mortgagor has a legal or contractual right to redeem; and, at the expiration of the contractual period, he has an equitable right to redeem which will last indefinitely.[17] He therefore has, at all times, a right to recover his property on the payment to the mortgagee of everything that is due to him.[18] This right can be specifically enforced and the land returned to the mortgagor on his repayment of the debt to the mortgagee. It is not surprising, therefore, that from the moment the mortgage was created, the mortgagor is considered by equity to retain a proprietary interest in the land. This proprietary interest is the Equity of Redemption.[19]

3. Methods of Creation

A. Legal Mortgages

i. Before 1926. We have seen that legal mortgages were usually created by a conveyance of the mortgagor's estate subject to a proviso for redemption. There was some variation with mortgages of leaseholds; for a leasehold might be mortgaged either by assignment of the entire term, or by sub-lease generally of the term less a few days. The former was the more common, but from the point of view of the mortgagee, the latter was more satisfactory, for he would escape privity of estate with the lessor, and thus liability on the lessee's covenants.[20] Legal and equitable rights to redeem existed as they did with mortgages of freeholds.

ii. Since 1925. Consistently with the policy of the 1925 legislation of keeping the legal estate in the person who is effectively the

16 See *per* Viscount Haldane in *Kreglinger* v. *New Patagonia Meat and Cold Storage Co.* [1914] A.C. 25 at p. 35.
17 Or until a court of equitable jurisdiction makes a foreclosure decree; *post*, p. 570.
18 *Per* Lord Parker in *Kreglinger* v. *New Patagonia Meat and Cold Storage Co.*, *supra*, at pp. 47, 48.
19 *Post*, p. 544 *et seq.*
20 *Spencer's Case* (1583) 5 Co.Rep. 16a; *Williams* v. *Bosanquet* (1819) 1 Brod. & Bing. 238; L.P.A. 1925, ss. 141, 142; *Re King* [1963] Ch. 459.

owner of the land, the Law of Property Act 1925 provided that mortgages could no longer be created by a conveyance of the fee simple, or by assignment of a term of years.

(a) *The General Scheme.* Mortgages of freeholds were to be effected either by the grant of a long lease to the mortgagee, or by a charge by deed expressed to be by way of legal mortgage.[21] Leaseholds were similarly to be mortgaged either by granting a sub-lease to the mortgagee or by a charge expressed to be by way of legal mortgage.[22] It was necessary also to make transitional provisions to deal with existing mortgages of the pre-1926 type and also with conveyancers who wrongly copied the old procedure instead of the new. Sections 85 (2) and 86 (2) provide that a purported conveyance of an estate in fee simple by way of mortgage after 1925 operates to grant to the mortgagee a term of 3,000 years; and a purported assignment of a term of years operates as a sub-demise of a term of at least ten days less than that expressed to be assigned.

The mortgagor thus retains the freehold or the leasehold reversion, as the case may be. The significance of this is that he retains a *legal* estate. Second and subsequent mortgages may henceforth be legal mortgages.

This is not to say that the equity of redemption is no longer of importance.[23] The legal estate retained by the mortgagor is of minimal value; a freehold reversion falling into possession in 3,000 years in the case of a mortgage of a freehold; and a leasehold reversion of a mere ten days in the case of a leasehold would attract few purchasers. The interest of substantial value which the mortgagor retains is the equity of redemption. This, as before 1926, is an equitable proprietary interest and is in value equal to the value of the land minus the debt secured by the mortgage. If land worth £10,000 is mortgaged for £6,000, the mortgagor has the right to redeem it, and recover the land free of the 3,000-year lease or the sub-demise, as the case may be, on payment of £6,000. An interest in £10,000-worth of land which becomes absolute on paying £6,000 is worth £4,000. The mortgagor retains that interest, and keeps a legal estate as well.

It may well be asked why the Legislature retained the cumbrous method of mortgaging land by *granting* an estate to the mortgagee. This appears to be a retention of the old forms for no good reason; it merely continued the pretence. What was needed was a procedure whereby the mortgagor by deed charged the land as security for the payment of a debt.

[21] L.P.A. 1925, ss. 85, 87.
[22] L.P.A. 1925, ss. 86, 87.
[23] M. & W., p. 887.

This is exactly what the charge by way of legal mortgage does. Section 87 (1) provides:

> "Where a legal mortgage of land is created by a charge by deed expressed to be by way of legal mortgage, the mortgagee shall have the same protection, powers and remedies (including the right to take proceedings to obtain possession from the occupiers and the persons in receipt of rents and profits, or any of them) as if—
>
> (*a*) where the mortgage is a mortgage of an estate in fee simple, a mortgage term for three thousand years without impeachment of waste had been thereby created in favour of the mortgagee: and
>
> (*b*) where the mortgage is a mortgage of a term of years absolute, a sub-term less by one day than the term vested in the mortgagor had been thereby created in favour of the mortgagee."

A simple form authorised for the purpose of creating such a charge appears in the Fifth Schedule to the Act.[24] The simplicity and convenience of such a procedure will be apparent when compared with the misleading complications of the pre-1926 method or the post-1925 methods of creation by demise or sub-demise contained in sections 85 and 86, respectively. It will be seen that the mortgagee under a charge by deed by way of legal mortgage is given the same protection, powers and remedies as a mortgagee under the more

[24]

LAW OF PROPERTY ACT 1925
FIFTH SCHEDULE

FORMS OF INSTRUMENTS

Section 206 — FORM NO. 1

CHARGE BY WAY OF LEGAL MORTGAGE

This Legal Charge is made [&c.] between *A* of [&c.] of the one part and *B* of [&c.] of the other part.

[*Recite the title of A to the freeholds or leaseholds in the Schedule and agreement for the loan by B.*]

Now in consideration of the sum of pounds now paid by *B* to *A* (the receipt &c.) this Deed witnesseth as follows:

1. *A* hereby covenants with *B* to pay [*Add the requisite covenant to pay principal and interest*].

2. *A* as Beneficial Owner hereby charges by way of legal mortgage All and Singular the property mentioned in the Schedule hereto with the payment to *B* of the principal money, interest, and other money hereby covenanted to be paid by *A*.

3. [*Add covenant to insure buildings and any other provisions desired.*]

In witness [&c.] [*Add Schedule*].

Note.—B will be in the same position as if a mortgage had been effected by a demise of freeholds or a sub-demise of leaseholds.

For fuller forms generally used, see Burnett, *Elements of Conveyancing* (6th ed.), p. 415; *Encyclopaedia of Forms and Precedents* (3rd ed.), Vol. X, Forms Nos. 87, 88, 167, pp. 155, 159, 346.

traditional methods; and that this method is applicable equally to mortgages of freeholds and leaseholds. In the years immediately following 1925, however, some conveyancers were reluctant to make use of the new procedure on the ground that the form contained no express proviso for cesser. A proviso for cesser in a mortgage by demise is a term corresponding to the old proviso for redemption and provides for the termination of the lease granted if the mortgagee repays principal and interest on the due date (usually six months from the date of the mortgage). The intention was always, as stated above,[25] that the debt should not be repaid at that time; but the proviso had the effect of establishing the date at which the money was payable, and consequently the date from which the mortgagor could demand to redeem, and the mortgagee had the right to foreclose.[26] Most conveyancers take the view[27] that these rights arise by implication on the date on which payment is due under the covenant to repay. If that is not so, and if the mortgagee's rights are thought to be better protected where the mortgage contains an express proviso for cesser, that is no reason to discard the charge by way of legal mortgage; the solution is to insert an express proviso in the charge.

(b) *Is the Legal Chargee a Tenant?* A chargee by way of legal mortgage obtains no estate in the land. He is given however the same "protection, powers and remedies" as if he held a 3,000-year term, or, in the case of a mortgage of a leasehold, a sub-term less by one day than the term vested in the mortgagor.[28] Thus he is able to create a sub-tenancy, and to enforce covenants contained in the charge against successors in title of the mortgagor.[29] He is entitled to relief against forfeiture as if he were a mortgagee by demise.[30]

It is clear however that he is not a lessee. Law of Property Act 1925, s. 87 (2), provides that a mortgagee whose estate was converted in 1926 into a term of years may, by a declaration in writing, convert the mortgage into a charge by way of legal mortgage, and the mortgage term shall then be extinguished.[31] Also, it was argued in *Weg Motors* v. *Hales*[32] that an option, given to a lessee by a mortgagor (the land being subject to a legal charge), should not be binding on the successors in title of the mortgagor. The argument

[25] *Ante*, p. 533.
[26] *Post*, p. 570.
[27] See Prideaux, *Precedents in Conveyancing*, 24th ed., Vol. 2, pp. 337–338, and compare this with 25th ed., Vol. 2, p. 342.
[28] L.P.A. 1925, s. 87.
[29] *Regent Oil Co. Ltd.* v. *J. A. Gregory (Hatch End)* [1966] Ch. 402.
[30] *Grand Junction Co. Ltd.* v. *Bates* [1954] 2 Q.B. 160; *Re Good's Lease* [1954] 1 W.L.R. 309; L.P.A. 1925, s. 146 (4).
[31] *Per* Evershed M.R. in *Weg Motors* v. *Hales* [1962] Ch. 49 at p. 74.
[32] [1962] Ch. 49.

was that Law of Property Act 1925, s. 142, provides that covenants by a lessor (*i.e.*, the mortgagor) only run with the reversion "if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease"; and that the lessor (mortgagor) had no such power because, the land being mortgaged, a term of years was outstanding in the mortgagee. This argument was denied, because the mortgagee under a charge by deed by way of legal mortgage has no term. The fact that the fee simple estate had been mortgaged by legal charge at the time when the option was created did not deprive the original lessors of power to bind the reversionary estate.[33] Further, a tenant who mortgages his lease is probably not in breach of a covenant against sub-letting without the landlord's consent.[34] Nor does a chargee have a term so as to effect a transfer to him under Law of Property Act 1925, s. 115.[35] Nor is it necessary to serve upon a mortgagee a notice under Law of Property Act 1925, s. 146, nor under Leasehold Property (Repairs) Act 1938.[36] As Donovan L.J. said in *Weg Motors* v. *Hales*[37]: "The section does not create even a notional term of years in the mortgagee, but simply defines what protection, powers and remedies the mortgagee is to have."

B. Equitable Mortgages and Charges

There are certain transactions which are recognised as mortgages in equity but not by common law. A beneficial owner of property may create a charge upon, or mortgage of, his property for the purposes of giving security to a lender by creating an equitable mortgage, just as he may by creating a legal mortgage. There are differences in respect of the property which may be charged, the way in which the charge may be created, and the effects of the charge.

i. The Property Chargeable and the Method of Creation of the Charge. Equitable mortgages may be created as follows.

(a) *Mortgage of an Equitable Interest.* Such a mortgage can never be a legal mortgage, for equitable interests are recognised in equity only, and not at law. A mortgage of an equitable interest may be created by effectively assigning the interest to the equitable mortgagee subject to a proviso that the interest shall be reconveyed on repayment of all principal, interest and costs due under the mortgage.

[33] *Ibid.* at p. 77 *per* Donovan L.J.
[34] *Grand Junction Co. Ltd.* v. *Bates* [1954] 2 Q.B. 160 at p. 168.
[35] *Cumberland Court (Brighton) Ltd.* v. *Taylor* [1964] Ch. 29.
[36] *Church Commissioners for England* v. *Ve-ri-best Manufacturing Ltd.* [1957] 1 Q.B. 238.
[37] [1962] Ch. 49 at p. 77.

Such a mortgage follows the model of an old-fashioned legal mortgage.[38] It is not necessary, however, that the assignment be made by deed. The assignment is of an equitable interest only, and requires to be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.[39]

(b) *Contract to Create a Legal Mortgage.* Under the discussion of the doctrine of Estate Contracts[40] it was established that where there was an enforceable contract to convey or create a legal estate, and in circumstances in which equity would decree specific performance of the contract,[41] equity looks on that as done which ought to be done, and treats the situation as if the legal estate had been conveyed or created. Without a seal, of course, a legal estate cannot be conveyed or created.[42] The fact that equity will treat the situation as if it has been, means that there has been a conveyance or creation of such an interest in equity but not at law. The transferee thus has an equitable interest corresponding to that which he would have had if the document had been sealed.

The agreement therefore creates a mortgage in equity. Such agreements rarely appear except in connection with a mortgage by deposit of title deeds,[43] the most common type of equitable mortgage, next described.

(c) *Equitable Mortgage by Deposit of Title Deeds.* A deposit of title deeds by the owner of the land with the intention that they shall be held by the depositee as security for a loan operates as an equitable mortgage.[44] This is because the deposit of the deeds with such intent is construed in equity as a contract to create a mortgage; the deposit being treated as an act of part performance and the intent being provable by written or oral evidence.[45] Proof of such intent is essential; it is common for title deeds and share certificates to be deposited with a bank for safe custody. Such a deposit alone does not create a mortgage; proof of intent to deposit them as security is lacking in such a case. It is convenient to record in an

[38] Waldock, 136: In practice a mortgage of a life interest is usually accompanied by a life insurance policy which ensures the availability of a fund to cover the debt.

[39] L.P.A. 1925, s. 53 (1) (*c*); *ante*, p. 119.

[40] *Ante*, p. 499 *et seq.*

[41] *Ante*, pp. 35, 38.

[42] Except in the case of a lease for three years or less; L.P.A. 1925, ss. 52 (1), 54 (1).

[43] See *Re White Rose Cottage* [1965] Ch. 940; and *Capital Finance Co.* v. *Stokes* [1968] 1 W.L.R. 1158, where an agreement between vendor and purchaser to leave 75 per cent. of the purchase money charged on the land was held to create an equitable mortgage from the date of the contract.

[44] *Russel* v. *Russel* (1783) 1 Bro.C.C. 269; L.P.A. 1925, s. 13, preserves this rule. A mortgage is good although the deeds deposited do not establish a perfect title; *post*, p. 590; Waldock, pp. 52, 53.

[45] *Bank of N.S.W.* v. *O'Connor* (1889) 14 App.Cas. 273 at p. 282.

accompanying memorandum the intent to deposit the deeds as security.

A mortgage of this sort is usually made to a bank. It has a number of advantages. It is simple in form; legal costs are reduced; no formal mortgage deed is necessary; and the mortgage when redeemed does not appear on the title. It is especially appropriate for loans over a short period of time, as on the simultaneous sale and purchase of houses. Also, it is suitable to cover a mortgage of a fluctuating sum of money like a bank overdraft. In such a case the customer will deposit with the bank title deeds to land (or share certificates or other valuable security) to a value which is adequate to cover the loan agreed, and this will give the bank a security for the amount at any time overdrawn, not being beyond the value of the securities deposited.[46]

Such a transaction will be effective to make the depositee an equitable mortgagee; and to give him all the appropriate rights and remedies. These do, however, not include a power to sell the security. For the power of sale is available only when the mortgage is made by deed.[47] But the problem would not be solved by sealing the memorandum of deposit. For the power to sell gives the equitable mortgagee only the power to sell the equitable interest which he has, and not the legal estate of the mortgagor.[48] Lord Denning has doubted this rule.[49] But the usual practice in order to overcome the difficulty is to include in the memorandum under seal a power of attorney [50] empowering the mortgagee to convey the legal estate; or inserting a declaration of trust, declaring that the mortgagor holds the legal estate on trust for the mortgagee and allowing the mortgagee to appoint someone (including himself) as trustee in place of the mortgagor. Sometimes both methods are used.

(d) *Equitable Charge.* An equitable charge arises where property is charged in equity with the discharge of a debt or some other obligation. Such a proceeding is equivalent in equity to the charge by way of legal mortgage at law. In each, there is no assignment of any property; but property in each case is charged as security for

[46] M. & W., p. 895; *Ex p. Langston* (1810) 17 Ves.Jr. 227; *Ex p. Kensington* (1813) 2 V. & B. 79.

[47] L.P.A. 1925, s. 101 (1) (i).

[48] *Re Hodson and Howes' Contract* (1887) 35 Ch.D. 668; *cf. Re Solomon and Meagher's Contract* (1889) 40 Ch.D. 508 (a decision under Lord Cranworth's Act 1860).

[49] *Re White Rose Cottage* [1965] Ch. 940 at p. 951.

[50] This takes effect as a sale by the mortgagor with the concurrence of the mortgagee; a purchaser therefore takes the same title as the mortgagor had, freed from the mortgagee's charge, but subject to other existing equities of which the purchaser has notice; *Re White Rose Cottage, supra.*

the repayment of a debt or discharge of some other obligation [51]; in one case charged in a way recognised in equity only; in the other, in a way now laid down by statute as appropriate to a legal charge.[52]

ii. Effect of Equitable compared with Legal Mortgages. We have seen that both legal and equitable mortgages create a situation in which property is charged as security for the repayment of money or for the discharge of some other obligation. Many questions, other than the creation of a charge, arise in respect of mortgage transactions; such as the remedies of the mortgagee if the mortgagor breaks the covenant to repay. The mortgagee's powers will be considered later.[53] We have already seen that an equitable mortgagee is in an inferior position to a legal mortgagee so far as the power of sale is concerned.[54] We will see that many other statutory powers are available only in cases of mortgages made by deed, which is always the case with legal mortgages, but not always so with equitable.[55]

One would expect also that there would be differences in the relationship between legal and equitable mortgagees and third parties. Indeed, there are; but they are not the differences which a student of the nature of legal and equitable estates would suppose.[56] It is probably true to say that an equitable mortgagee is liable to lose his interest if a bona fide purchaser of the legal estate for value without notice buys the land [57]; while a legal mortgagee would be immune. Where however the third party is another mortgagee, a series of separate rules was created to determine the issue of priority between mortgagees. These will be considered later.[58] Let it be said here that there was, before 1926, no problem of competition between successive legal mortgagees; for a legal mortgagee conveyed his legal estate to the mortgagee, and successive mortgagees were of necessity equitable.[59] Competition did arise between a prior equitable and later legal mortgagee, between a prior legal and later equitable mortgagee, and between successive equitable mortgagees.[60] It was

[51] *Matthews* v. *Goodday* (1861) 31 L.J.Ch. 282; *Re Owen* [1894] 3 Ch. 220; *London County and Westminster Bank* v *Tompkins* [1918] 1 K.B. 515 at p. 528.
[52] L.P.A. 1925, s. 87; *ante*, p. 536.
[53] *Post*, p. 561 *et seq.*
[54] *Ante*, p. 540.
[55] *Post*, pp. 564, 568.
[56] *Ante*, p. 15 *et seq.*
[57] *Oliver* v. *Hinton* [1899] 2 Ch. 264; *Walker* v. *Linom* [1907] 2 Ch. 104. Some mortgages are made registrable by L.C.A. 1925, s. 10 (1); *post*, p. 543.
[58] *Post*, p. 573 *et seq.*
[59] See, however (1941) 7 Camb.L.J. 243–244 (R. E. Megarry). The problem of competition could arise if mortgages of a freehold were effected by a demise, or of a leasehold by sub-demise. These were rare methods of creating mortgages before 1926. The problems involved were not thoroughly worked out. The natural rule to apply to determine priority if successive legal mortgages did occur was that of order of creation.
[60] *Post*, pp. 575–582.

not possible to solve all these questions by resort to the rule of bona fide purchaser for value without notice. The surprising thing is that that rule was not applied even to the first of the above categories.[61] The complex question of priorities is further complicated by the fact that the situation was basically changed in 1925 by a system which is not however complete in itself, but which has to rely on some of the pre-1926 rules; and which itself raises some apparently insoluble problems.[62]

C. Second and Subsequent Mortgages

Such questions of priority arise where there is more than one mortgage of the same piece of land. This will happen where a mortgagor wishes to borrow further money on the security of his land. Before 1926, a mortgagor of freeholds was no longer the owner of the fee simple; the first mortgagee had that. The mortgagor, however, retained, as we have seen, a proprietary interest, the equity of redemption, and he could mortgage this by transferring it to the second mortgagee, who, as the property mortgaged was equitable, became only an equitable mortgagee. The mortgage would contain the usual contractual right to redeem, and equity, as before, would allow an equitable right to redeem. The mortgagor thus owns an equity of redemption still, but it exists in respect of his right to reclaim the land after paying off both mortgages. Any number of further mortgages could be created in the same way.

The procedure for creating second and subsequent mortgages changed in 1925, and depends on the form in which it is made. Where the first mortgage is created by granting a long lease, the later mortgages will usually[63] be by way of lease also, granting to the second mortgagee a term one day longer than the term granted to the earlier mortgagee.[64] The longer lease, even by one day, gives to the later mortgagee a legal estate lasting beyond that held by the prior mortgagee. Of course, the one-day lease which will not fall into possession for 3,000 years is, like that of the mortgagor's freehold reversion after a 3,000-year lease, of little value. The substantial interest which the mortgagor retains after the first mortgage and which is the substance of the second mortgage is, as explained above,[65] his equity of redemption. After the second mortgage, he still has his equity of redemption, which he can sell or mortgage

[61] *Hewitt* v. *Loosemoore* (1851) 9 Hare 449; *Oliver* v. *Hinton* [1899] 2 Ch. 264.
[62] *Post*, pp. 590–593.
[63] But could be by charge by way of legal mortgage.
[64] See L.P.A. 1925, s. 86 (2) (*b*).
[65] *Ante*, p. 535.

again; but its value now is the value of the land minus all that is due under the *two* mortgages.

If the property mortgaged is leasehold, and is created by way of sub-demise, the mortgagor may grant to another mortgagee a further sub-demise, longer than the original one, but not amounting to an assignment of the whole term, for that is forbidden.[66] Thus, if the first mortgage is by sub-demise of the mortgagor's term less one day, no further mortgage by sub-demise is possible, as the only additional security which the mortgagor could give to a second mortgagee would be the whole of his interest. It is prudent therefore to sub-demise for a period of several days short of the full term of the mortgagor when making the first mortgage. And for this reason, the Law of Property Act 1925, s. 86 (2) provides that a purported assignment of a term of years by way of mortgage after the commencement of the Act, shall operate as a sub-demise of a term ten days less than the mortgagor's leasehold interest, and that the term to be taken by a second or subsequent mortgagee shall be one day longer than the term vested in the mortgagee immediately before him.

Many of these problems are avoided if the second or later mortgage is effected by a charge by deed by way of legal mortgage. In that situation the mortgagor merely charges his present interest (that is, his interest in the land, subject to the prior charge). The procedure is the same whether the property to be mortgaged is freehold or leasehold.

D. Sub-Mortgages [67]

The mortgagee's interest is something of value; and like anything of value, it may itself be mortgaged. Such a mortgage would be a sub-mortgage; a mortgage of a mortgage. A legal sub-mortgage may be effected by the grant of a sub-term for a period shorter than that held by the mortgagee, or by legal charge; and equitable sub-mortgages may be created in the usual way. A sub-mortgage of an equitable mortgage or of a mortgage by legal charge may be effected, as before 1926, by an assignment of the mortgage debt subject to a proviso for redemption.

E. Registration

The 1925 legislation provides for the registration of certain mortgages as land charges.[68] Registration is used as a method of giving

[66] L.P.A. 1925, s. 86 (1).
[67] (1948) 12 Conv.(N.S.) 171 (H. Woodhouse).
[68] L.C.A. 1925, s. 10 (1).

notice to the world of the existence of a mortgage. If, however, the mortgagee takes the mortgagor's deeds (as first mortgagees do), the absence of the deeds will be a sufficient warning to anyone dealing subsequently with the mortgagor. For this reason, mortgages (whether legal [69] or equitable [70]) of legal estates in land are registrable where the mortgagee does not take the deeds; but they are not registrable where he does. Failure to register a registrable mortgage carries the usual consequences, namely, that it is void against a purchaser of the land charged therewith.[71] Questions relating to registrability of mortgages usually arise in the context of priority of mortgages, and the matter is discussed in more detail below.[72]

4. The Equity of Redemption

We have seen that a mortgagor may redeem the property mortgaged by paying off all principal, interest and costs due under the mortgage; that he will ordinarily be entitled to do this by virtue of a contractual right to redeem which is given to him by the mortgage agreement or, after his contractual right has expired, by virtue of the equitable right to redeem, which is given to him by equity.[73] It is by reason of these rights to redeem, that the mortgagor is considered to retain, throughout the mortgage, an equitable proprietary interest in the land, namely, the equity of redemption. As Lord Parker said in *Kreglinger* v. *New Patagonia Meat and Cold Storage Co.*[74]: "The equity to redeem, which arises on failure to exercise the contractual right of redemption, must be carefully distinguished from the equitable estate, which, from the first, remains in the mortgagor, and is sometimes referred to as an equity of redemption."

A. The Proprietary Nature of the Equity of Redemption

Lord Hardwicke L.C. described an equity of redemption as follows[75]: "An equity of redemption has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by a fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin[76]; the person therefore entitled to the equity of redemption is con-

69 Class C. (i) (a "puisne mortgage").
70 Class C (iii) (a "general equitable charge").
71 L.C.A. 1925, s. 13 (2).
72 *Post*, p. 588 *et seq.*
73 *Ante*, pp. 533–534.
74 [1914] A.C. 25 at p. 48.
75 *Casborne* v. *Scarfe* (1737) 1 Atk. 603 at p. 605.
76 This must have been used in the sense of being in possession. There was technically no seisin of equitable estates.

sidered as the owner of the land . . . The interest of the land must be somewhere, and cannot be in abeyance, but it is not in the mortgagee, and therefore must remain in the mortgagor."

In *Re Sir Thomas Spencer Wells*,[77] a company mortgaged leasehold land to mortgagees and later went into liquidation. The rents received from the land were insufficient to meet the interest due under the mortgage, and the liquidator, thinking that the company's interest was worthless, took no steps to include it in the dissolution proceedings. Later the rents increased, and became sufficient to pay off all interest due under the mortgage. The equity of redemption thus became of value. The mortgagees claimed the leaseholds on the ground that they were the owners at law and that the mortgagors, being no longer in existence, could not exercise their right to redeem. The Court of Appeal however denied this claim. The equity of redemption, being a proprietary interest, could only pass to the mortgagees by an assignment, and none had been made. The mortgagor could not make any claim because the company no longer existed. The leaseholds, subject to the mortgage, went to the Crown as *bona vacantia*.

The distinction between the equitable right to redeem and the equity of redemption is not always correctly made by judges and writers. It will be seen in cases mentioned in the next section that the rule that there must be no clog or fetter on the equity of redemption is referred to in connection with restrictions upon the right to redeem, and also in connection with the requirement that the mortgagor's property should not be subjected to restrictions other than its use as a security for the loan or other obligation. No harm is done so long as the true nature of the equity of redemption is understood.

B. The Protection of the Mortgagor

Equity has always regarded the mortgagor as being in a weak bargaining position because of his need of money, and as a potential victim of a grasping moneylender.[78] The introduction of the equitable right to redeem was an attempt to reduce the injustice of the mortgagor's position under a common law mortgage. Further doctrines giving protection to the mortgagor in respect of his right to redeem and of the inviolability of his equity of redemption developed from

[77] [1933] Ch. 29.

[78] Rates of interest were restricted by the Usury Laws until abolished by an Act of 1854 (17 & 18 Vict. c. 90); *Mainland* v. *Upjohn* (1889) 41 Ch.D. 126; *Cityland and Property (Holdings) Ltd.* v. *Dabrah* [1968] Ch. 166 at p. 174.

the seventeenth century. The doctrines were useful and beneficial in the context in which they were developed. The seventeenth- and eighteenth-century concept of the mortgagor is that of a landed proprietor in need of money who is forced to submit to whatever terms the moneylender imposes. Protection was needed in the interests of justice; but this was no doubt aided by society's preference for the gentry over the Jews.

The rules emerged in the seventeenth century.[79] The leading authorities at the present time are cases litigated at the turn of the present century.[80] These cases did not therefore establish these rules. They were cases which tested whether or not the principles of the old decisions still applied. By and large, the House of Lords followed the old principles, although there were dissenting voices.[81]

The strict application of the old rules was neither necessary nor beneficial in a society which had changed into one where loan capital was freely available to anyone whose credit was good or who was able to give adequate security. As explained above,[82] many mortgagors are borrowers out of choice and not out of necessity; indeed, the more money you have the more you can borrow. And many of the land developers of the 1950s made fortunes almost entirely out of the use of borrowed money. In such a situation, the mortgagor is free to make his own bargain with the mortgagee and has his choice of lender.

It will be seen, as the cases are discussed, that from 1914 onwards there has been a tendency to restrict the application of the old rules; and to permit the agreement of the parties to stand unless there is evidence of harsh or unconscionable [83] dealing, or, of course, other rules of law are transgressed.[84] The exact status of these rules at the present day will be explained as the cases are developed.

The application of the principle of the inviolability of the right to redeem and the equity of redemption can be conveniently divided into three propositions.

[79] *Howard* v. *Harris* (1681) 1 Vern. 33.

[80] *Salt* v. *Marquess of Northampton* [1892] A.C. 1; *Biggs* v. *Hoddinott* [1898] 2 Ch. 307; *Santley* v. *Wilde* [1899] 2 Ch. 474; *Noakes* v. *Rice* [1902] A.C. 24; *Reeve* v. *Lisle* [1902] A.C. 461; *Bradley* v. *Carritt* [1903] A.C. 253; *Samuel* v. *Jarrah Timber Corp.* [1904] A.C. 323.

[81] Lord Lindley, both as Master of the Rolls and later as a Lord of Appeal, always favoured the liberal application of the old rules. His view received general approval by the House of Lords in *Kreglinger* v. *New Patagonia Meat and Cold Storage Co. Ltd.* [1914] A.C. 25 at p. 44.

[82] *Ante*, p. 531.

[83] For a recent example see *Cityland and Property (Holdings) Ltd.* v. *Dabrah* [1968] Ch. 166.

[84] As where an arrangement which includes a mortgage is a contract in restraint of trade: *Esso Petroleum Ltd.* v. *Harper's Garage (Stourport) Ltd.* [1968] A.C. 269.

i. "Once a mortgage, always a mortgage." This maxim, which goes back to the seventeenth century [85] means that where there is a transaction, which on its proper construction is a mortgage, equity will not allow provisions to be introduced which take away the essential nature of a mortgage. It may be necessary for the court to determine whether a transaction is a mortgage or a sale. If land were conveyed to X for £10,000 and the conveyance contained a covenant that Z would reconvey the land in six months' time and on payment of £10,250, the transaction may be construed as a mortgage.[86]

> In *Salt* v. *Marquess of Northampton* [87] a loan of £10,000 was made to Earl Compton on the security of a reversionary interest to which he would become entitled on succeeding his father. As part of the arrangement an insurance policy was taken out which was to become the property of Earl Compton if he repaid the loan in his father's lifetime; otherwise the policy was owned by the insurance company, all proceeds of the policy being applied towards the debt. Earl Compton died in his father's lifetime, having repaid nothing. The House of Lords held that the agreement concerning the policy was properly a mortgage transaction; and therefore the representatives of Earl Compton could claim the proceeds on paying all sums outstanding.

Again, an option given to the mortgagee to purchase the property will not prevent the transaction being a mortgage. If it is held to be a mortgage, the option will be void.[88]

The general principle in favour of protecting the mortgagor is sound and usually commands support. But its remorseless application has been unsatisfactory and has led to a number of fine distinctions. In *Samuel* v. *Jarrah Timber Corp.*,[89] a provision giving the mortgagee an option to purchase the mortgaged property was held void, although there was no suggestion of harsh dealing or oppression. *Reeve* v. *Lisle* [90] was different, for there the option was granted subsequently to the mortgage. Lords Halsbury and Macnaghten took part in both cases. Of *Samuel* v. *Jarrah Timber Corp.*,[89] striking down the option, Lord Halsbury said [91]: "A perfectly

[85] *Howard* v. *Harris* (1681) 2 Vern. 33; *Seton* v. *Slade* (1802) 7 Ves.Jr. 265 at p. 273, *per* Lord Eldon.
[86] *England* v. *Codrington* (1758) 1 Eden 169; *Vernon* v. *Bethell* (1762) 2 Eden 110.
[87] [1892] A.C. 1.
[88] *Samuel* v. *Jarrah Timber Corp.* [1904] A.C. 323; *Lewis* v. *Frank Love Ltd.* [1961] 1 W.L.R. 261.
[89] [1904] A.C. 323.
[90] [1902] A.C. 461.
[91] [1904] A.C. 323 at p. 325.

fair bargain made between two parties to it, each of whom was quite sensible of what they were doing, is not to be performed because at the same time a mortgage arrangement was made between them. If a day had intervened between the two parts of the arrangement, the part of the bargain which the appellant claims to be performed would have been perfectly good and capable of being enforced; but a line of authorities going back for more than a century has decided that such an arrangement as that which was here arrived at is contrary to a principle of equity, the sense or reason of which I am not able to appreciate, and very reluctantly I am compelled to acquiesce in the judgments appealed from." Lord Macnaghten [92]: "I should not be sorry if your Lordships could see your way to modify it so as to prevent its being used as a means of evading a fair bargain come to between persons dealing at arm's length and negotiating on equal terms. The directors of a trading company in search of financial assistance are certainly in a very different position from that of an impecunious landowner in the toils of a crafty moneylender. At the same time I quite feel the difficulty of interfering with any rule that has prevailed so long, and I am not prepared to differ from the conclusion at which the Court of Appeal has arrived." The same principle was applied in *Lewis* v. *Frank Love Ltd.*[93] where, on the transfer of a mortgage, the mortgagor gave to the transferees an option to purchase. Separate documents were used for the transfer and the option; but Plowman J. declared himself "quite satisfied that the loan . . . and the grant of the option were all part and parcel of one transaction." [94]

ii. Contractual Postponement of the Right to Redeem. Another way in which the mortgagor's right of redemption could be prejudiced would be by postponing the possibility of its exercise for a very long period of time. The mortgagee is not permitted to take away the mortgagor's right to redeem. For how long shall he be allowed to postpone it? Clearly for six months; for that has been the standard practice for centuries. For five years? [95] For twenty years? [96] For twenty-eight years? [97] For forty years? [98] For the period of the mortagor's interest less a nominal period? [99] For the whole of the mortgagor's interest? [1]

[92] *Ibid.* at p. 327.
[93] [1961] 1 W.L.R. 261.
[94] *Ibid.* at p. 267.
[95] *Biggs* v. *Hoddinott* [1898] 2 Ch. 307.
[96] *Davis* v. *Symons* [1934] Ch. 442.
[97] *Morgan* v. *Jeffreys* [1910] 1 Ch. 620.
[98] *Knightsbridge Estates Trust Co.* v. *Byrne* [1939] Ch. 441.
[99] *Fairclough* v. *Swan Brewery* [1912] A.C. 565.
[1] *Santley* v. *Wilde* [1899] 2 Ch. 474.

In *Biggs* v. *Hoddinott*,[2] the owner of a public-house mortgaged it to a brewer in a deed which provided, (i) that during the continuance of the mortgage, the mortgagor would purchase beer only from the mortgagee, and (ii) that the mortgage should not be redeemed for five years. The Court of Appeal upheld the deed on both points. The five-year postponement gave the court no difficulty. The main argument related to the restriction on the purchase of beer, which is more relevant to the next section than to this one.

In *Fairclough* v. *Swan Brewery*,[3] the mortgagor was a tenant of the respondent brewery, holding an unexpired lease of seventeen and a half years. The mortgage prevented redemption until a date six weeks before the expiration of the lease. There was no direct evidence of oppression. The Privy Council held that the right of redemption was in effect taken away and that the provision was void. The right of redemption was not merely postponed; it was in effect denied.

In *Knightsbridge Estates Trust Ltd.* v. *Byrne*,[4] the owners of freehold property had mortgaged it at $6\frac{1}{2}$ per cent. interest. They decided to pay off this loan and agreed to borrow that sum from the defendant at a much lower rate of interest, $5\frac{1}{4}$ per cent., repayable by eighty half-yearly instalments over forty years. The defendants (mortgagees) undertook not to require payment in any other way. The plaintiffs then found, six years later, that interest rates had declined and that they could then borrow the money more cheaply. They brought this action for redemption on the ground that the postponement was oppressive, illegal and void. The Court of Appeal refused to interfere. The bargain was freely entered into at arm's length, and the plaintiffs sensed oppression only when they found out that their estimate of future interest rates was wrong. "But equity does not reform mortgage transactions because they are unreasonable. It is concerned to see two things—one that the essential requirements of a mortgage transaction are observed, and the other that oppressive or unconscionable terms are not enforced. Subject to this, it does not, in our opinion, interfere. The question therefore arises whether in a case where the right of redemption is real and not illusory and there is nothing oppressive or unconscionable in the transaction, there is something in a postponement of the contractual right to redeem, such as we have in the present case, that is inconsistent with the essential

[2] [1898] 2 Ch. 307; *Morgan* v. *Jeffreys* [1910] 1 Ch. 620.
[3] [1912] A.C. 565.
[4] [1939] Ch. 441.

requirements of a mortgage transaction? Apart from authority the answer to this question would, in our opinion, be clearly in the negative." [5]

Knightsbridge Estates Trust Ltd. v. *Byrne* subsequently went to the House of Lords,[6] where the decision was affirmed, but on another ground. For the House construed the mortgage as a debenture within section 380 of the Companies Act 1929; a condition rendering a debenture irredeemable is valid.[7] The Court of Appeal decision stands however in respect of other mortgages.

It is interesting to consider what the Court of Appeal would have done in the *Knightsbridge* case [8] if the plaintiffs had owned, not a freehold, but a forty-year lease. All the arguments relating to the free bargain at arm's length would still have applied. An owner of a lease who wishes to develop the land and sub-let it may well find it to his advantage to postpone redemption until the end of the term, if he can borrow the necessary money more cheaply by doing so. The matter is entirely one of business calculation—with which the Court of Appeal declined to interfere. But such a mortgage conflicts with the principle of the *Fairclough* case [9] and with the first main proposition of the *Knightsbridge* case.[10] We have reached the problem which we meet in many aspects of the subject of mortgages; is the rule about irredeemability to be applied remorselessly? Or applied only in the context of harsh dealing and oppression? There was no direct evidence of oppression in the *Fairclough* case; but the relationship between the parties was that of landlord and tenant as well as that of mortgagee and mortgagor. And, as Lord Macnaghten said: "It was obviously meant to be irredeemable." [11] In other words, the landlord clearly intended to "tie" the public-house during the remainder of the tenant's term.

Santley v. *Wilde* [12] is a decision which has been much misunderstood and much criticised. It is not even agreed into which category it fits. Lord Davey always considered it to be a case of collateral

5 *Ibid. per* Lord Greene M.R. at p. 457.
6 [1940] A.C. 613.
7 A debenture is normally a floating charge upon the assets of the company as a going concern. This differs from an ordinary mortgage (a fixed charge) in that no particular chattel or land owned by the company carries the charge. If the company charged specific assets—as one on its buildings—the mortgagee would be able to exercise the mortgagee's usual rights over that asset. Where the charge is "floating" no specific asset is charged, and the company can deal freely with any of its assets, until the debenture-holders take the appropriate steps to realise their security.
8 [1939] Ch. 441.
9 [1912] A.C. 565.
10 *Ante*, p. 549.
11 [1912] A.C. 565 at p. 570.
12 [1899] 2 Ch. 474.

advantage existing after redemption.[13] Megarry and Wade say that "the decision proceeded on the ground that without the covenant there would have been insufficient security."[14] Dr. J. H. C. Morris suggested that the decision could be accepted by treating the relationship of the parties as a partnership.[15] Cheshire, having treated the case in earlier editions as a case on collateral advantages, now says that it is in conflict with *Fairclough*.[16]

The plaintiff mortgaged a sub-lease of a theatre to the defendant Wilde. The mortgage provided for the repayment of the capital by instalments, and also that "during the residue of the term . . . notwithstanding that all principal moneys and interest may have been paid . . . pay . . . a sum equal to one-third part of the clear net profit rent or rents to be derived from" the lease. There was an express provision that the mortgage should determine on payment of all principal and interest "and all other the moneys hereinbefore covenanted . . . to be paid. . . ." The plaintiff claimed a declaration that she was entitled to redeem on the payment of principal, interest and costs, and that the provision for the payment of a share of the profits was illegal and void.

It will be shown in the next section that the reservation of an advantage to the mortgagee collateral to the mortgage itself and existing after redemption may be void. Was this such a collateral advantage? It would be if the mortgage were redeemed on the repayment of principal, interest and costs, so that the covenant to pay the share of the profits was an advantage collateral to the mortgage and existing independently of and subsequently to it. Lindley M.R. however construed the payment of the share of the profits as part of the obligation for which the lease was mortgaged. After excluding any suggestion of fraud or oppression and describing the terms of the mortgage he said[17]: "That means that this lease is granted or assigned by the mortgagor to the mortgagee as security not only for the payment of the £2,000 and interest, but also for the payment of the one-third of the net profit rents to the end of the term. . . . That is the nature of the transaction, and the good sense of it." A security is redeemable "on the performance of the obligation for which it was given."[18] That meant that the loan was redeemed

[13] See *Noakes* v. *Rice* [1902] A.C. at pp. 31, 34.
[14] M. & W., p. 933, n. 67.
[15] Waldock, p. 187, n. 67.
[16] Cheshire, p. 584, n. 5; *cf.* 3rd ed., p. 587.
[17] [1899] 2 Ch. 474 at p. 476.
[18] *Ibid.* at p. 475.

only on the payment of principal, interest, costs *and* the share of the profits. There was no collateral advantage existing after redemption.

Since however the profits could not be earned until the end of the lease, the mortgage was not redeemable until the end of the lease. It is submitted that the decision should be welcomed on that ground. There is no technical problem of authority; for *Fairclough* is a Privy Council case [19]; and the statement about irredeemable mortgages in *Knightsbridge* is *obiter*, for the issue was not before the court. The reasoning of the *Knightsbridge* decision should, it is submitted, have still applied if the property mortgaged had been a forty-year lease. A business bargain freely entered into should be upheld in the absence of fraud or oppression. The old rule should not be applied remorselessly. As Lord Parker of Waddington said in *Kreglinger* [20]: ". . . if [such maxims] be acted on without a careful consideration of the equitable considerations on which they are based, [they] can only, like Bacon's idols of the market place, lead to misconception and error.

"We will suppose that money is advanced to a company repayable at the expiration of fifteen years, not an unusual period, and that the company by way of security sub-demises (as is often the case) to trustees for the lenders a number of leaseholds, some of which are held for terms less than fifteen years. It would, in my opinion, be a serious error to argue that this was an attempt to make an irredeemable mortgage. There would be the same error in objecting on the like ground to a mortgage of leaseholds to secure an annuity for a period exceeding the term of the lease. If the mortgage is irredeemable at all, this arises from the nature of the property mortgaged and not from any penal or repugnant stipulation on the part of the mortgagee, and the maxim properly understood is in no way infringed."

iii. A Collateral Advantage in Favour of the Mortgagee. There are other ways in which a grasping mortgagee could extract further benefits for himself from a mortgagor. He might provide, for example, for interest to continue after redemption or for premiums or bonuses or other payments in his favour [21]; or that the mortgagor

[19] [1912] A.C. 565; it could perhaps also be distinguished on the ground of restraint of trade: *Esso Petroleum Co. Ltd.* v. *Harper's Garage (Stourport) Ltd.* [1968] A.C. 269.

[20] [1914] A.C. 25 at p. 53.

[21] *Cityland and Property (Holdings) Ltd.* v. *Dabrah* [1968] Ch. 166 at p. 180. Lord Parker said in *Kreglinger* v. *New Patagonia Meat and Cold Storage Co. Ltd.* [1914] A.C. 25 at p. 61 that such provisions were void if "unfair and unconscionable." Halsbury, Vol. 27, para. 428, says that the contract to pay a bonus is valid if it is "reasonable." It is submitted that this latter test is inadequate, for the reasons given in *Knightsbridge Estates Ltd.* v. *Byrne* [1939] Ch. 441; *ante*, p. 549.

should purchase his beer (or oil and petrol) only from the mortgagee. Most of the cases are concerned with collateral covenants affecting the user of the property after redemption. There is again the problem of drawing the line between freedom of contract and the application of the strict rules. We have seen that a small inroad was made into the strict rules by *Biggs* v. *Hoddinott* [22] where the Court of Appeal held that a tying of a public-house for the five years during which redemption was postponed was permissible. But the pendulum swung back. In *Noakes* v. *Rice*,[23] the House of Lords struck down a tying clause in so far as it continued after redemption. There must be no stipulation, said Lord Davey,[24] "which will prevent a mortgagor, who has paid principal, interest and costs, from getting back his mortgaged property in the condition in which he parted with it." Otherwise there would be a clog on the equity of redemption. "Once a mortgage, always a mortgage, and nothing but a mortgage."

Bradley v. *Carritt* [25] took the matter further.

> A mortgage of shares in a tea company contained a clause whereby the mortgagor covenanted that he would "always thereafter" use his best endeavours to ensure that the company retained the mortgagee's firm as their brokers—and in the event of a new broker being substituted, would pay to the mortgagee the amount which he would have received by way of commission on the sale of the company's teas had his services been retained. Was this invalid as a clog on the equity of redemption? The House of Lords, reversing Bigham J. and the Court of Appeal,[26] by a majority of three to two held the clause void. The clause did not of course prevent the property from returning to the mortgagor in the condition in which it was before the mortgage; for such restrictions do not run with tea shares. But the mortgagor was effectively restricted in his use of the shares; for it was only by retaining the shares that he was able to control the appointment of the company's agents.

There the matter rested in an unsatisfactory state for eleven years.

> In *Kreglinger* v. *New Patagonia Meat and Cold Storage Co. Ltd.*,[27] the parties were both commercial firms, the mortgagors being meat preservers, the mortgagees wool brokers.

[22] [1898] 2 Ch. 307.
[23] [1902] A.C. 24.
[24] *Ibid.* at p. 33.
[25] [1903] A.C. 253.
[26] [1901] 2 K.B. 550.
[27] [1914] A.C. 25; followed in *Cityland and Property (Holdings) Ltd.* v. *Dabrah* [1968] Ch. 166.

The security took the form of a floating charge over the assets of the mortgagors. The agreement gave the mortgagees for five years a right of pre-emption at the best price offered by any person, over sheepskins sold by the mortgagors. The mortgagors paid off the loan in three years, and claimed to be free from the whole agreement. The House unanimously decided that the agreement should stand, and that it continued to bind the mortgagors notwithstanding the termination of the mortgage relation.

Here the restriction, such as it was, did affect the property mortgaged. It would appear therefore to be a clearer case for invalidity than was *Bradley* v. *Carritt*.[28] But if a deal involving £10,000[29] between two international commercial corporations acting at arm's length and without oppression or fraud is to be held void because the mortgagor must sell to the mortgagee rather than anyone else at the open market price, the law will be reduced to a caricature. By what route did their Lordships reach a decision: so obvious on the facts, so difficult in law because of previously binding precedents?

The two leading speeches are those of Lord Haldane and Lord Parker of Waddington. Lord Haldane's basic thesis is simple. The matter is one of construction. Is the provision which is challenged part of the mortgage transaction; or is it quite a separate matter, whose validity or invalidity stands or falls on its own merits?[30] "The question is . . . not whether the two contracts were made at the same moment and evidenced by the same instrument, but whether they were in substance a single and undivided contract or two distinct contracts . . . if . . . your Lordships arrive at the conclusion that the agreement for an option to purchase the respondents' sheepskins was not in substance a fetter on the exercise of their right to redeem, but was in the nature of a collateral bargain the entering into which was a preliminary and separable condition of the loan, the decided cases cease to present any great difficulty." Lord Parker's thesis is more difficult to extract. He concludes that[31] "there is now no rule in equity which precludes a mortgagee . . . from stipulating for any collateral advantage, provided such collateral advantage is not either (1) unfair and unconscionable, or (2) in the nature of a penalty clogging the equity of redemption, or (3) inconsistent with or repugnant to the contractual and equitable right to redeem." Here the "option was not in the nature of a penalty, nor

[28] [1903] A.C. 253.
[29] In 1910; say £100,000 at the present day.
[30] [1914] A.C. 25 at p. 39; *Rosemex Service Station Ltd.* v. *Shell-Mex & B.P. Ltd.* (1968) 207 E.G. 1229.
[31] *Ibid.* at p. 61.

was it nor could it ever become inconsistent with or repugnant to any other part of the real bargain within any such rule or maxim." [32]

The result probably is that the courts now feel themselves free to depart from the strictness of the rule against collateral advantages where the provision can be construed as being an undertaking separate from the mortgage, or where it is neither a penalty nor repugnant to the right to redeem. It might be added also that the collateral advantage problem does not arise if the provision is construed as being part of the security itself, as in *Santley* v. *Wilde*.[33] The problem arises where the proper construction is somewhere in between. These are vague concepts which leave the courts wide scope. It may be that if the issue reaches the House of Lords again, they may exercise their new freedom to overrule some of the older cases.[34] However that may be, the problem appears only rarely at the present time.[35]

A modern context in which the problem might be considered to be topical is that of the tying of petrol stations.[36] The forms of the tie have been stricter than those of the public-houses at the beginning of the century. The oil companies, however, learned from the experience of the brewers, and drafted the agreements so as to restrict the tie to the period of the mortgage, as in *Biggs* v. *Hoddinott*.[37] No attacks based upon the doctrines relating to the protection of the mortgagor have, so far as is known, succeeded. Indeed, an argument has been produced that mortgagees are governed by their own principles and "fall totally outside the 'doctrine' of restraint of trade," [38] and are therefore immune from the doctrine of restraint of trade. That argument was discarded in *Esso Petroleum Ltd.* v. *Harper's Garage (Stourport) Ltd.*,[39] when Lord Wilberforce said [40]: "The mere designation of a transaction as a mortgage, however true, does not *ipso facto* protect the entire contents of the arrangements from examination however fettering of trade these arrangements may be." Thus the test of reasonableness returns. At least the oil

[32] *Ibid.* at p. 61.
[33] [1899] 2 Ch. 474; *ante*, pp. 550–552.
[34] *Practice Direction* [1966] 1 W.L.R. 1234.
[35] See, however, *Cityland and Property (Holdings) Ltd.* v. *Dabrah* [1968] Ch. 166.
[36] *Clark* v. *Supertest Petroleum Corp.* (1958) 14 D.L.R. (2d) 545; *Hill* v. *Regent Oil Co. Ltd.* [1962] *Estates Gazette Digest* 452; *Regent Oil Co. Ltd.* v. *Aldon Motors Ltd.* [1965] 1 W.L.R. 956; *Regent Oil Co. Ltd.* v. *J. T. Leavesley (Litchfield) Ltd.* [1966] 1 W.L.R. 1210; *Petrofina (Gt. Britain) Ltd.* v. *Martin* [1966] Ch. 146; *Esso Petroleum Co. Ltd.* v. *Harper's Garage (Stourport) Ltd.* [1968] A.C. 269.
[37] [1898] 2 Ch. 307.
[38] *Per* Lord Wilberforce in *Esso Petroleum Ltd.* v. *Harper's Garage (Stourport) Ltd.* [1968] A.C. 269 at p. 341.
[39] [1968] A.C. 269; *Cleveland Petroleum Co. Ltd.* v. *Dartstone Ltd.* [1969] 1 W.L.R. 116.
[40] *Ibid.* at p. 342.

companies of the present day are allowed wider scope than their brewing predecessors.

5. Consolidation

A. General

The right of a mortgagee to consolidate mortgages against a mortgagor is a right to insist that, if the mortgagor claims to redeem one mortgage, he shall redeem the others also. The right becomes material where a mortgagor has mortgaged two or more properties and the same person is mortgagee of both; and one of them falls in value below the mortgage debt which is charged upon it, but the properties together are sufficient in total to meet the whole of the debt. It is in the interests of the mortgagor to redeem the valuable properties, but not the one which carries a charge which is greater than its value. The mortgagee, on the other hand, will claim that he has in total a security which is sufficient to support all the charges. In the simple case where Blackacre and Whiteacre are both mortgaged by A to B, B can insist that A redeem both or neither.

B. The Mortgage Money Must be Due

Consolidation is a doctrine of equity. The right only arises therefore after the legal or contractual right to redeem has expired. He who seeks equity must do equity. A mortgagor wishing to redeem after that time must rely on the equitable right to redeem; and it is inequitable to seek to redeem the property which has retained its value and to leave unredeemed another property which is no longer an adequate security for the debt.[41]

C. Law of Property Act 1925, s. 93

Since 1882, the right to consolidate does not exist unless expressly provided for in the mortgage deeds or one of them.[42] Trustees advancing money on mortgage should always, therefore, ensure that the right to consolidate is inserted in the deed.

D. Transferees

The doctrine may apply between persons who were not the original parties. Thus if A has mortgaged Blackacre and Whiteacre to X, and X transfers both mortgages to Y, Y may consolidate against A.[43] And if A transfers the equities of redemption to B (as

41 *Cummins* v. *Fletcher* (1880) 14 Ch.D. 699 at p. 708.
42 L.P.A. 1925, s. 93, re-enacting Conveyancing Act 1881, s. 17; see *Hughes* v. *Britannia Permanent Benefit Building Society* [1906] 2 Ch. 607.
43 See *Selby* v. *Pomfret* (1861) 1 J. & H. 336.

by selling the properties, subject to the mortgages, or by effecting second mortgages of the properties [44]), Y may consolidate against B.[45]

There can never be consolidation unless the same person is the mortgagor of the properties in question.[46] Thus, if A mortgages Blackacre to X, and B mortgages Whiteacre to X, and both mortgages come into A's hands, or B's, or those of a third party, C, there is no right to consolidate.

It is not necessary that the original mortgagees should have been the same. If A mortgages Blackacre to X, and Whiteacre to Y, and the mortgages both come into X's hands, or Y's, or those of a third party, Z; X, Y or Z, as the case may be, can consolidate against A.[47]

Further, if A had transferred both equities of redemption to B, whether before or after the union of the mortgages, the mortgagee could have consolidated.[48] A transferee of two equities of redemption from a single (original) mortgagor runs the risk of the mortgages coming into the same hands, and giving a right to consolidate.

A transferee of one equity of redemption only is in a different position. If a right to consolidate exists when he takes the transfer, he takes subject to that right [49]; otherwise not. Nor does he take subject to a right to consolidate later mortgages unless there is an agreement to that effect, of which he has notice.[50] If A has mortgaged Blackacre and Whiteacre to X (or to different mortgagees but the mortgages have become vested in X), there is a right to consolidate against A. If A transfers the equity of redemption in Blackacre to B, B takes it subject to the right to consolidate, and may have to redeem Whiteacre also if he wishes to redeem Blackacre. But if A mortgaged Blackacre to X, and Whiteacre to Y; then transferred the equity of redemption in Blackacre to B, and *subsequently* the mortgages became united in Z, there would be no right to consolidate.[51]

These rules are technical. They can cause problems for a purchaser of an equity of redemption, for he may not know that the vendor has mortgaged other properties, which mortgages are now in

[44] A second mortgage used always to involve the transfer of the mortgagor's equity of redemption to the second mortgagee. The same terminology is currently in use; but (in the case of a charge by way of legal mortgage) it would be more correct to speak of the equity of redemption being further charged in favour of the second mortgagee.

[45] *Vint* v. *Padget* (1858) 2 De G. & J. 611.

[46] *Sharp* v. *Rickards* [1909] 1 Ch. 109.

[47] *Pledge* v. *White* [1896] A.C. 187.

[48] *Willie* v. *Lugg* (1761) 2 Ed. 78; *Vint* v. *Padgett* (1858) 2 De G. & J. 611; *Pledge* v. *White*, *supra*.

[49] *Jennings* v. *Jordan* (1881) 6 App.Cas. 698 at p. 701.

[50] *Hughes* v. *Britannia Permanent Benefit Building Society* [1906] 2 Ch. 607.

[51] *Jennings* v. *Jordan*, *supra*; *Harter* v. *Colman* (1882) 19 Ch.D. 630.

the hands of the same mortgagee. The doctrine has been criticised,[52] and, as has been seen, restricted by statute.[53] Its technicalities were summed up by Lord Davey in a formula which seems to cover all the cases. Provided that the mortgages were originally made by the same mortgagor, the doctrine applies "where at the date when redemption is sought all the mortgages are united in one hand and redeemable by the same person, or where, after that state of things has once existed, the equities of redemption have become separated." [54]

6. Marshalling of Securities

A. General

The doctrine of marshalling is a principle of equity by virtue of which a secured creditor, B, can require a prior creditor, A, to take satisfaction out of assets upon which creditor B has no lien; thus leaving B's security available for him.[55] "If a creditor has two funds, he shall take his satisfaction out of that fund upon which another creditor has no lien." [56]

For example: if A mortgages Blackacre and Whiteacre to B; then mortgages Blackacre to C; C can require B to satisfy himself in the first instance out of Whiteacre. If B exercises his rights against Blackacre, the court will allow C to resort to Whiteacre, although C had no charge on that property.

B. Adjustment of Equities Between Mortgagees

This is not a case where C is seeking to redeem Blackacre; if he were seeking to do this, B could, as we have seen, compel him to redeem Whiteacre as well,[57] but it is simply a question of the adjustment of equities. B cannot be prejudiced; if the whole of both properties is required to satisfy him, then he is entitled to take the whole, but if one only, or one together with part of the other, is sufficient, then it is clearly of no moment to him which one he exhausts first, and equity will compel him to have recourse primarily against Whiteacre, so as to leave Blackacre available to C.[58]

52 In *Pledge* v. *White* [1896] A.C. 187 at p. 190 (Lord Halsbury).
53 L.P.A. 1925, s. 93, *ante*, p. 556.
54 In *Pledge* v. *White*, *supra*, at p. 198.
55 For other applications of the general principle, see *Theobald on Wills* (12th ed.), paras. 2097–2101; *Williams on Executors and Administrators* (14th ed.), p. 1004 *et seq.*
56 *Per* Lord Hardwicke in *Lanoy* v. *Duke and Duchess of Athol* (1742) 2 Atk. 444.
57 *Hughes* v. *Britannia Permanent Benefit Building Society* [1906] 2 Ch. 607.
58 *Cf. Re Cornwall* (1842) 3 Dr. & War. 173; *Gibson* v. *Seagrim* (1855) 20 Beav. 614.

C. Position of Third Party

In *Titley* v. *Davies*[59] Lord Hardwicke allowed a second mortgagee, by redeeming the mortgages held by a first, to use them as a lever of consolidation against a third mortgagee of one of them.

But Romilly M.R. in *Gibson* v. *Seagrim*,[60] and Kay L.J. in *Flint* v. *Howard*[61] denied that securities could be marshalled against a third mortgagee, and Ashburner points out that Lord Hardwicke's decision is opposed to the principles of consolidation as now recognised.[62] The decision of Knight Bruce V.-C. in *Barnes* v. *Racster*[63] is preferable.

> A mortgaged Blackacre to B.
>
> A mortgaged Blackacre to C.
>
> A mortgaged Whiteacre to B, at the same time giving him a second mortgage on Blackacre.
>
> A mortgaged both properties to D.[64]
>
> The estates were insufficient to pay all the mortgages, but Whiteacre was sufficient to pay B in full. C claimed to have B's debt thrown entirely on to Whiteacre; this would, in effect, render C first mortgagee of Blackacre, and leave nothing for D. But the court refused so to marshal the securities in favour of C: it insisted that B's debt must be thrown rateably (*i.e.*, in proportion to their net values) on the two properties. So D was enabled to get something out of Whiteacre. It will be observed that if C had purchased B's mortgage of Whiteacre, he could have consolidated against D, on the authority of the decisions on which *Vint* v. *Padget*[65] was subsequently based.

The doctrine applies only where the mortgagor of the two properties is the same person; the courts will never, where A and B have both mortgaged properties to C, and B has also mortgaged his property to D, compel C to resort primarily to A.[66]

7. The Relationship Between the Parties During the Continuance of the Mortgage

Equity regards the mortgagor as continuing to be the real owner of the mortgaged property so far as that is consistent with the rights

[59] (1743) 2 Y. & C.Ch. 399n.
[60] (1855) 20 Beav. 614.
[61] [1893] 2 Ch. 54.
[62] *Principles of Equity*, 2nd ed., p. 214. *Cf. Re Mower's Trusts* (1869) L.R. 8 Eq. 110, where the third mortgage was expressly subject to the first two mortgages.
[63] (1842) 1 Y. & C.Ch. 401.
[64] The headnote inaccurately says that A mortgaged both properties initially to B.
[65] (1858) 2 De G. & J. 611.
[66] *Ex p. Kendall* (1811) 17 Ves.Jr. 514.

of the mortgagee to protect his security. The mortgagor does not hold the land as trustee for the mortgagee, for their interests are adverse.[67] While he remains in possession, the mortgagor is entitled to the full beneficial interest in the land, and to take the income and profits from the land without being required to account to the mortgagee or to apply them towards the payment of interest on the debt.[68]

A. The Mortgagor in Possession

A mortgagor in possession may also grant leases. His possession is precarious, for the mortgagee has, as we shall see,[69] the right to demand possession at any time without notice and without even a previous demand for possession.[70] In such circumstances, the mortgagor is unable, as one would expect, to grant leases which are binding on the mortgagee.[71] He can, however, grant tenancies which are binding on himself by estoppel.[72]

Mortgages often used to contain provisions giving to the parties power to make leases binding on the other, and this matter is now, subject to contrary agreement by the parties, governed by the Law of Property Act 1925, s. 99,[73] which gives the mortgagor in possession power to make agricultural or occupational leases up to fifty years, and building leases up to 999 years, the Act laying down certain conditions which such leases must fulfil,[74] the most important of which, in that it recognises that such leases are granted out of the mortgagee's term, is that the mortgagor must, within one month from the date of the execution of the lease, deliver a counterpart thereof to the mortgagee who is first in priority.[75]

It is common for the mortgage deed to exclude the mortgagor's power to grant leases, or to provide that the mortgagor shall not exercise the power without the consent of the mortgagee. A lease then granted without consent[76] is void against the mortgagee. The

67 *Dobson* v. *Land* (1850) 8 Hare 216.
68 *Trent* v. *Hunt* (1853) 9 Exch. 14; *Heath* v. *Pugh* (1881) 6 Q.B.D. 345 at p. 349, *per* Lord Coleridge; *Ex p. Wilson* (1813) 2 V. & B. 252.
69 *Post*, p. 562.
70 *Four-Maids* v. *Dudley Marshall (Properties) Ltd.* [1957] Ch. 317.
71 *Rogers* v. *Humphreys* (1835) 4 A. & E. 299 at p. 313; *Dudley and District Benefit B.S.* v. *Emerson* [1949] Ch. 707; *Rust* v. *Goodale* [1957] Ch. 33.
72 *Cuthbertson* v. *Irving* (1860) 6 H. & N. 135; *Church of England B.S.* v. *Piskor* [1954] Ch. 553.
73 In some cases the statutory power cannot be excluded; Agricultural Holdings Act 1948, Sched. 7, para. 2; Landlord and Tenant Act 1954, s. 36 (4).
74 A lease may be validated by L.P.A. 1925, s. 152, in spite of the failure to observe some of the conditions: *Pawson* v. *Revell* [1958] 2 Q.B. 360.
75 See also L.P.A. 1925, s. 100, giving to a mortgagor power to accept surrenders of leases for the purpose of enabling a lease authorised by s. 99 to be granted.
76 The onus is on the tenant to prove consent, which is not established merely by the fact that the mortgagee allowed the tenant to occupy: *Taylor* v. *Ellis* [1960] Ch. 368.

lessee will not even be protected against him under the Rent Acts.[77] However, in *Lever Finance Ltd.* v. *Needleman's Trustee*[78] the stipulation was followed by a provision that a lessee should not be concerned to see that the mortgagee's consent had been given, and this was held to work an estoppel on the mortgagee's assignee, who was seeking to eject the lessee.

A lease granted in defiance of Law of Property Act 1925, s. 99, or of the terms of the mortgage deed, may, though void against the mortgagee, be binding on the mortgagor and on the lessee by estoppel.[79] The mortgagor then retains the usual landlord's remedies in respect of the enforcement of the lease.[80] The lessee cannot of course enforce his lease against the mortgagee; but his lease is a sufficient interest in the equity of redemption to entitle him to redeem.[81] He may protect himself by redeeming; otherwise his only remedy is an action for damages against the mortgagor.[82]

B. The Rights of the Mortgagee without the Realisation of the Mortgage

i. The Right to Sue on the Personal Covenant. This is the most straightforward right of all. Through his mortgage, the mortgagee has a real right over the land, but he also retains his personal right against the mortgagor. He is not the less a creditor because he is a secured creditor.[83]

A mortgage deed should provide expressly for the repayment of both principal and interest, so that the right to sue for each is distinct, and actions for the recovery of either can be brought separately.[84] In the absence of any such covenant, or any covenant at all for repayment, the promise to pay will be implied from the acceptance of the loan, and the mortgagee can sue for the recovery of the money due on a simple contract.[85] The money becomes due on the date stated; but sometimes the principal is made payable on demand.

An action to recover money due under a mortgage may be combined with an order for foreclosure.[86] Indeed, judgment in a foreclosure action is in the alternative; the mortgagor is either to pay or

[77] *Dudley Benefit B.S.* v. *Emerson* [1949] Ch. 707; see also *Barclays Bank* v. *Stasek* [1957] Ch. 28; *Rust* v. *Goodale* [1957] Ch. 33.
[78] [1956] Ch. 375.
[79] *Ante*, p. 560, note 72.
[80] *Cuthbertson* v. *Irving* (1860) 6 H. & N. 135.
[81] *Cholmondeley* v. *Clinton* (1821) 2 Jac. & W. 1 at p. 182. *Tarn* v. *Turner* (1888) 39 Ch.D. 456.
[82] *Howe* v. *Hunt* (1862) 31 Beav. 420.
[83] Maitland, p. 182.
[84] *Dickenson* v. *Harrison* (1817) 4 Pr. 282.
[85] *Sutton* v. *Sutton* (1882) 22 Ch.D. 511 at p. 516, *per* Jessel M.R.
[86] *Post*, p. 570.

be foreclosed.[87] If foreclosure takes place and the land proves insufficient to recoup the mortgagee, he can *then* sue on the personal covenant; but such a course automatically revives the mortgagor's equity of redemption.[88] However, he may only sue on the personal covenant after foreclosure if he still retains the mortgaged property in his hands[89]; a sale after foreclosure extinguishes liability on the debt.[90] This is an example of the rule that the mortgagee can only sue on the personal covenant if he is able and willing to reconvey the mortgaged property; he cannot demand repayment from the mortgagor unless he is able and willing to surrender the security.[91]

ii. The Right to Enter into Possession. A legal mortgagee whether by demise or by legal charge is entitled to possession of the mortgaged premises.

(*a*) *Independent of the Mortgagor's Default*. His right is independent of any default of the mortgagor. In *Four-Maids* v. *Dudley Marshall (Properties) Ltd.*,[92] Harman J. emphatically stated " that the right of the mortgagee to possession in the absence of some contract has nothing to do with default on the part of the mortgagor. The mortgagee may go into possession before the ink is dry on the mortgage unless there is something in the contract, express or by implication, whereby he has contracted himself out of that right. He has the right because he has a legal term of years in the property . . ."

(*b*) *Procedure*. At one time an order for possession could be obtained summarily in the King's Bench Division. In 1936 claims for possession were transferred from that Division to the Chancery Division, where the mortgagee has to prove his case before getting an order for possession, even if the mortgagor does not appear.[93] Even if he does prove it, the court exercises a discretion in making the order.

The extent of this discretion is a matter of great practical importance. As will be seen later, a mortgagee in possession is required to account strictly not only for what he receives while in possession,

87 For the form of order for payment, see *Farrer* v. *Lacy, Hartland & Co.* (1885) 31 Ch.D. 42.
88 *Perry* v. *Barker* (1806) 13 Ves.Jr. 198.
89 *Ibid.*
90 *Lockhart* v. *Hardy* (1846) 9 Beav. 349; *cf. Gordon Grant & Co.* v. *Boos* [1926] A.C. 781.
91 *Palmer* v. *Hendrie* (1859) 27 Beav. 349; *Walker* v. *Jones* (1866) L.R. 1 P.C. 50.
92 [1957] Ch. 317 at p. 320; *Owen* v. *Cornell* (1967) 203 E.G. 29. See also (1961) 25 Conv.(N.S.) 278; (1962) 106 S.J. 238 (B. Rudden); *Rudden and Moseley on Mortgages*, pp. 61–64.
93 R.S.C., Ord. 88, replacing Ord. 55, r. 5 (*a*) (*c*); County Courts Act 1959, s. 48 (1), as amended by County Courts (Jurisdiction) Act 1963, s. 1, gives jurisdiction to the County Court when the net annual value does not exceed £400; *West Penwith R.D.C.* v. *Gunnell* [1968] 2 All E.R. 1005.

but also for what he could have received by prudent management.[94] For the purpose of receiving income from the property, the taking of possession is a less satisfactory remedy than the appointment of a receiver. On the other hand, as Harman J. explained,[95] an application for possession "has become a very fashionable form of relief, because, owing to the conditions now prevailing, if it is desired to realise a security by sale, vacant possession is almost essential." In other words, an application for possession is a preliminary to sale. When the power to sell becomes exercisable,[96] the mortgagee does not proceed at once to sell, for he would be selling property in the occupation of the mortgagor. A purchaser would have to take proceedings after purchase to evict the mortgagor. This would depress the price. A mortgagee therefore prefers to evict the mortgagor before sale and to sell with vacant possession.

This situation commonly arises where a purchaser of a home under a building society mortgage is in arrears with his instalments. If the building society exercises its power of sale, having first obtained vacant possession, the mortgagor will be deprived of his home. This is a serious social matter, and a broad discretion has been claimed in respect of the making of orders for possession.[97] However, Russell J. in *Birmingham Citizens' Permanent Building Society* v. *Caunt*[98] said that "Where . . . the legal mortgagee under an instalment mortgage under which, by reason of default, the whole money has become payable, is entitled to possession, the court has no jurisdiction to decline the order or to adjourn the hearing . . . if the mortgagee cannot be persuaded to agree to this course. To this the sole exception is that the application may be adjourned for a short time to afford to the mortgagor a chance of paying off the mortgage in full, or otherwise satisfying him; but this should not be done if there is no reasonable prospect of this occurring."

(*c*) *The Mortgagee's Power to Grant Leases.* The mortgagee in possession is, by sections 99 (2) and 100 (2) of the Law of Property Act 1925, given the same powers of granting and accepting surrenders of leases as are by the same sections given to the mortgagor.[99]

(*d*) *The Mortgagee's Liability to Account.* At first sight, entry into possession would seem a satisfactory and efficient method of ensuring the prompt payment of interest. Equity, however, deals

[94] *White* v. *City of London Brewery Co.* (1889) 42 Ch.D. 237; *post*, p. 564.
[95] In *Four-Maids* v. *Dudley Marshall (Properties) Ltd.* [1957] Ch. 317 at p. 321.
[96] *Post*, p. 568.
[97] (1961) 77 L.Q.R. 331 (Master Ball).
[98] [1962] Ch. 883 at p. 912; followed in *London Permanent Benefit B.S.* v. *De Baer* [1969] 1 Ch. 321.
[99] *Ante*, p. 560.

very strictly with a mortgagee in possession. The mortgagee is never permitted to recover more than is strictly due to him under the mortgage.[1] If the income is in excess of the annual interest, he may however, if he wishes, apply it towards the payment of the principal; but he cannot be compelled to do so because he will not be made to accept payment in driblets.[2] He is made to account on the footing of wilful default.[3] He may even be ordered to account with half-yearly rests; if this form of account is ordered, it means that excess profits are regarded as repayment of principal, and are deducted every six months from the capital sum due.[4] But it is only in exceptional circumstances that such an order is made.[5] Even where such an order is not made, the mortgagee is made to account not only for the profits which he actually received but also for those which he might have received if he had acted prudently.

> Thus in *White* v. *City of London Brewery*,[6] the plaintiff, a publican, mortgaged his public-house to the defendant brewery company. The defendant entered into possession and leased the house to a tenant who undertook to purchase his supplies of beer from the defendants. The Court of Appeal held that the defendants should account, not only for the rent actually received, but for the rent which they could have received if they had let the premises without such a restriction.

If he occupies the property personally he is also charged with an occupation rent.[7] These disadvantages are sufficiently formidable to deter most mortgagees from entry into possession, and the remedy is rarely applied in practice except, as explained above,[8] where possession is taken as a preliminary to sale.

iii. The Right to Appoint a Receiver. A mortgagee can ensure that profits arising from the mortgaged property are applied in payment of interest by appointing a receiver. He has power to do so if the mortgage is made by deed [9] or if an express power is given to make an appointment. The receiver may be appointed (and

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[1] Waldock, pp. 238–239.
[2] *Nelson* v. *Booth* (1858) 3 De G. & J. 119 at p. 122; *Wrigley* v. *Gill* [1905] 1 Ch. 241.
[3] *Hughes* v. *Williams* (1806) 12 Ves.Jr. 493; *Parkinson* v. *Hanbury* (1867) L.R. 2 H.L. 1; *Chaplin* v. *Young* (*No.* 1) (1863) 33 Beav. 330 at pp. 337–338; *White* v. *City of London Brewery* (1889) 42 Ch.D. 237.
[4] Maitland, p. 187.
[5] *Wrigley* v. *Gill* [1905] 1 Ch. 241; *Ainsworth* v. *Wilding* [1905] 1 Ch. 435; Waldock, p. 240.
[6] (1889) 42 Ch.D. 237.
[7] "At their utmost value," *Lord Trimleston* v. *Hammill* (1810) 1 Ball & B. 377 at p. 385.
[8] *Ante*, p. 562.
[9] L.P.A. 1925, ss. 101, 109.

removed) by writing.[10] The statutory power can only be exercised, however, like the power of sale, when certain conditions concerning the default of the mortgagor have been fulfilled.[11] A receiver can be appointed after a mortgagee has gone into possession.[12]

The appointment of a receiver has a great advantage over the taking of possession as a method of obtaining income from the mortgaged property. As we have seen, a mortgagee in possession is made to account on the footing of wilful default[13]; a receiver however is "deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults unless the mortgage deed otherwise provides."[14] The receiver can recover the income by action or distress, and can give effectual receipts.[15] He can be removed, and a successor appointed, by the mortgagee alone. Out of the money received by him, he can reimburse himself for necessary expenses, and pay himself remuneration, but for both these purposes only up to 5 per cent. of its amount. Section 109 contains detailed provisions as to the order in which he must apply the money received by him.[16] His duties are statutory, but they are imposed for the benefit of the mortgagee. It follows, therefore, that the mortgagee can maintain an action against him for an account.[17]

8. Termination of the Equity of Redemption: Realisation of the Mortgage

A. Redemption by the Mortgagor

The most natural way by which a mortgage terminates is by payment by the mortgagor to the mortgagee of all that is due in respect of principal, interest and costs. The debt is paid; the mortgagor again becomes the unincumbered owner; the mortgagee's security is at an end.

Before 1926, it was in most cases necessary for the mortgagee to reconvey to the mortgagor the legal interest which was vested in him by the mortgage. The Law of Property Act 1925, s. 115 (1), however provides that a receipt indorsed on or annexed to a mortgage stating the name of the person paying the money and executed by the mortgagee operates to determine any interest in the mortgagee and to discharge the mortgage. Where the money appears

[10] *Ibid.* s. 109 (1) (5).
[11] *Ibid.* ss. 101 (1) (iii), 109 (1) (i); *post*, p. 568.
[12] *Refuge Assurance Co.* v. *Pearlberg* [1938] Ch. 687.
[13] *Ante*, p. 564.
[14] L.P.A. 1925, s. 109 (2).
[15] *Ibid.* s. 109 (3).
[16] *Ibid.* s. 109 (8).
[17] *Leicester Permanent B.S.* v. *Butt* [1943] Ch. 308.

to have been paid by a person who is not entitled to the immediate equity of redemption, the indorsed receipt operates as a transfer of the mortgage to him.[18] A mortgagor, however, may not, by redemption of one of several mortgages, keep alive a mortgage paid off by him to the prejudice of later incumbrancers.[19] In other words, if a mortgagor pays off one of several mortgagees, the mortgagor does not himself take the precedence of the redeemed mortgagee to the disadvantage of other mortgagees. The redeemed mortgage just disappears from the list. However, a later purchaser of the equity of redemption may himself pay off the first mortgage and keep it alive against the later mortgagees.[20] And a mortgagor, and any other person entitled to redeem, may require the mortgagee, on payment, instead of surrendering the term, to transfer the security to a person nominated by him.[21] Independently of these provisions, a mortgage term, when the money secured by the mortgage has been discharged, becomes a satisfied term and ceases.[22]

i. Redemption by Agreement or by Action. Redemption usually takes place by private agreement and out of court. If however there are special complications in the case, or the mortgagee refuses to accept the money when properly tendered, a redemption action may be necessary.[23] Any person entitled to redeem the mortgaged property may, in an action for redemption or sale, have an order for sale instead of redemption.[24]

ii. Notice of Intention to Redeem. A mortgagor seeking to exercise his right to redeem must give six months' notice of his intention to do so, in order that the mortgagee may have time to look for a new investment, or he must pay six months' interest in lieu of notice.[25] It would appear that if the mortgagor fails to redeem on the day fixed by the notice, the mortgagee is entitled to a further period of notice of reasonable extent.[26] All mortgages, however, are not investments, for a mortgage by deposit of title deeds[27] is generally an expedient adopted for a short-term loan, usually from

[18] L.P.A. 1925, s. 115 (2).

[19] *Ibid.* s. 115 (3); *Otter* v. *Vaux* (*Lord*) (1856) 6 De G.M. & G. 638; *Cumberland Court* (*Brighton*) *Ltd.* v. *Taylor* [1964] Ch. 29; *ante*, p. 538.

[20] *Adams* v. *Angell* (1877) 5 Ch.D. 634; *Thorne* v. *Cann* [1895] A.C. 11; *Whiteley* v. *Delaney* [1914] A.C. 132.

[21] L.P.A. 1925, s. 95 (1) (2).

[22] *Ibid.* ss. 5, 116.

[23] M. &. W., p. 939.

[24] L.P.A. 1925, s. 91 (1); *Clarke* v. *Pannell* (1884) 29 S.J. 147.

[25] *Johnson* v. *Evans* (1889) 61 L.T. 18.

[26] See *Re Moss* (1885) 31 Ch.D. 90; *Cromwell Property Investment Co.* v. *Western and Toovey* [1934] Ch. 322.

[27] *Ante*, p. 539.

a bank, and in this case a mortgagee is not entitled to six months' notice of intention to redeem, or six months' interest in lieu of it.[28]

iii. Redeem Up: Foreclose Down. Where a redemption or foreclosure action is brought, there may be several persons who are interested in the accounts which will be taken between the main parties to the action. If there are five mortgages affecting the land in question, and mortgagee No. 4 wishes to redeem No. 2, all the mortgagees subsequent to No. 2, and also the mortgagor are concerned with the account which will be struck to determine how much mortgagee No. 2 is owed; for the more that is due on No. 2's mortgage, the less there is available from the security for the remainder of the people interested in it.[29]

It would be sufficient to require mortgagees Nos. 3 and 5 and the mortgagor to be made parties, so that they can put forward their interests. But this solution would mean that they would be put to the expense and inconvenience of a court appearance on each occasion on which a redemption action took place among mortgagees having priority to them. Equity says that all questions affecting persons concerned with the accounts must be settled once and for all. Thus No. 4, wishing to redeem No. 2, must redeem also the intervening No. 3. No. 5 and the mortgagor have their chance also to redeem those above them. They must now do so, or stand foreclosed. Thus the rule is redeem up: foreclose down. And all questions arising out of the original redemption action are settled in the one action. No. 1 is unconcerned. He has a prior claim to all the others, and is not concerned with the state of accounts between them.

As we shall see, foreclosure can only be effected by action.[30] A mortgagee who forecloses must foreclose down—*i.e.*, a foreclosure order will foreclose all those below him and the mortgagor. The lower mortgagees and the mortgagor have their chance to redeem, and must redeem those above them up to the foreclosing mortgagee —or be foreclosed. There is no need for the foreclosing mortgagee to redeem mortgagees above him[31]; for prior mortgagees are not concerned with the dealings with interests in the security inferior to theirs.

B. Purchase of Equity of Redemption by the Mortgagee

A mortgagee may purchase the equity of redemption from the mortgagor. This is a further illustration of the fact that the relation

[28] *Fitzgerald's Trustee* v. *Mellersh* [1892] 1 Ch. 385.
[29] M. & W., p. 940 *et seq.*
[30] *Post*, p. 570.
[31] *Richards* v. *Cooper* (1842) 5 Beav. 304.

of mortgagee and mortgagor is not a trust relationship. Lord Cottenham laid down that such a transaction cannot be impeached on the ground of inadequacy of price, but only because of fraud[32]; and the fraud in question is not "of that species which is referable to dealings between trustee and *cestui que trust*, but only of that species on account of which a transaction between ordinary vendors and purchasers might be set aside."[33] A mortgagee, however, exercising his power of sale is, like a trustee, barred from selling to himself.[34]

C. Sale by the Mortgagee under the Statutory Power

i. The Power Arising and Becoming Exercisable. Under the pre-1926 system, a mortgagee who held the fee simple could transfer it; but the transferee took subject to the equity of redemption of the mortgagor. The transfer was a transfer of the mortgage and not of the absolute interest in the land. Elaborate conveyancing devices were introduced in order to enable the mortgagee to give a good title, free from the equity of redemption.[35] The mortgagee now has a statutory power of sale.[36] As indicated above,[37] a distinction has to be made between the time at which the power of sale *arises* and that at which it becomes *exercisable*. Under Law of Property Act 1925, s. 101, the power *arises* as soon as the mortgage money becomes due. This will usually be the legal date for redemption. Complications arise, however, when the principal is repayable by instalments; but in *Payne* v. *Cardiff Rural District Council*,[38] where the principal was payable by instalments, it was held that the power arose as soon as a single instalment fell due.

Law of Property Act 1925, s. 103, provides that the power is not *exercisable* until *one* of three events has occurred:

(i) Notice requiring payment of the mortgage money has been served on the mortgagor, and default in payment of part or all of it has been made for three months afterwards.[39]

(ii) Some interest is in arrear and unpaid for two months after becoming due.

[32] *Knight* v. *Marjoribanks* (1849) 2 Mac. & G. 10; *cf. Fox* v. *Mackreth* (1788) 2 Bro.C.C. 400.
[33] *Knight* v. *Marjoribanks*, *supra*, at p. 15.
[34] *Farrar* v. *Farrars Ltd.* (1888) 40 Ch.D. 395 at p. 409.
[35] Maitland, p. 188 *et seq.*
[36] L.P.A. 1925, ss. 101–107. The power was first given by Lord Cranworth's Act 1860; it is subject to variation or extension by the terms of the mortgage deed (s. 101 (4)).
[37] *Ante*, p. 563.
[38] [1932] 1 K.B. 241; Waldock, p. 258.
[39] The three months' period runs from the service of the notice, not from the date fixed by the notice for payment: *Barker* v. *Illingworth* [1908] 2 Ch. 20.

(iii) The mortgagor has broken some contractual or statutory provision, other than that for the payment of principal or interest of the mortgage debt.[40]

The reason for the distinction between the power of sale *arising* and becoming *exercisable* is that a purchaser can tell, from examining the title deeds, when the power arises—*i.e.*, he can see that the mortgage is by deed and that the contractual date for the repayment of the principal has passed; but he cannot necessarily discover whether the defaults mentioned in Law of Property Act 1925, s. 103, have been made. Therefore, although a mortgagee should not sell before the power becomes exercisable, a sale after the power has arisen will convey a good title to a purchaser. The purchaser is not concerned to see whether an occasion has arisen which makes the power *exercisable* or whether the power is properly exercised.[41] But any person who is prejudiced by an improper sale has a remedy in damages against the person exercising the power.[41] While the purchaser need not make inquiries as to the propriety of the sale, he cannot hide behind these provisions if he is aware of any impropriety.[42]

ii. Effect of Sale under Statutory Power. Sale under the statutory power passes a fee simple to the purchaser, subject to any legal mortgage having priority over the mortgage in right of which the sale is made.[43] Where the mortgagor's interest is leasehold, and the mortgage is by sub-demise,[44] the sale by the mortgagee operates to vest in the purchaser not only the mortgage term but also, unless expressly excepted with leave of the court,[45] the leasehold reversion affected by the mortgage, subject to any legal mortgage having priority over the mortgage in right of which the sale is made.[46]

iii. Duties of Mortgagee in Exercising Statutory Power of Sale. The mortgagee is in no sense a trustee for the mortgagor of his power of sale.[47] That is to say, the mortgagor cannot impeach the sale merely

[40] The parties may provide that the power of sale shall be exercised free from the restrictions imposed by this section: *Alliance B.S.* v. *Shave* [1952] Ch. 581; *Alliance B.S.* v. *Yap* [1962] 1 W.L.R. 857.
[41] L.P.A. 1925, s. 104 (2).
[42] *Jenkins* v. *Jones* (1860) 2 Giff. 99; *Selwyn* v. *Garfit* (1888) 38 Ch.D. 273; *Bailey* v. *Barnes* [1894] 1 Ch. 25; *Lord Waring* v. *London and Manchester Assurance Co. Ltd.* [1935] Ch. 310 at p. 318; M. & W., pp. 904, 905.
[43] L.P.A. 1925, ss. 88, 104, 2 (1) (iii).
[44] Or by way of legal charge, which has the same legal effect; L.P.A. 1925, s. 87 (1).
[45] This may be done in order to prevent the purchaser becoming liable upon the covenants in the lease.
[46] L.P.A. 1925, s. 89 (1).
[47] *Cholmondeley* v. *Clinton* (1821) 2 Jac. & W. 1, 182; *Warner* v. *Jacob* (1882) 20 Ch.D. 220 at p. 224; *Farrar* v. *Farrars Ltd.* (1888) 40 Ch.D. 395.

on the ground that the land could have been sold for more than was obtained, had the mortgagee postponed selling.[48] Because the mortgagee's interest is essentially adverse to that of the mortgagor, it would be illogical to apply to him the rule which governs a trustee, that he must not put himself into a position in which his interest will be in conflict with his duty.[49] But he must act in good faith[50]; and he may not sell to himself.[51]

iv. Mortgagee as Trustee of Surplus Proceeds of Sale. Although a mortgagee is not trustee of his power of sale, he is trustee of the proceeds of sale. The proceeds of sale are applicable in discharge of prior incumbrances, if any, to which the sale is not made subject, and thereafter are held upon trust to be applied in the following order:

(i) In payment of expenses properly incurred by him in connection with the sale.
(ii) In discharge of the mortgage debt and costs.
(iii) To pay the residue to the person entitled to the mortgaged property,[52] *i.e.*, a subsequent mortgagee or the mortgagor.

D. Foreclosure

Foreclosure is a judicial procedure by which the court orders the termination of the mortgagor's equity of redemption. Before 1926, when the mortgagor conveyed his whole interest to the mortgagee subject to a proviso for redemption, the foreclosure order needed to do no more than order the termination of the equity of redemption. Since 1925, the mortgagor's legal estate would remain outstanding,[53] and the Law of Property Act 1925, ss. 88 (2) and 89 (2), provide for the vesting of the fee simple and reversionary term of years in the mortgagee.

Foreclosure is thus a procedure whereby the mortgagee's interest ceases to be merely a security and becomes absolute. As would be expected, foreclosure can only be effected by an order of court and

[48] *Lord Waring* v. *London and Manchester Assurance Co. Ltd.* [1935] Ch. 310; *Murad* v. *National Provincial Bank* (1966) 198 E.G. 117; *Property and Bloodstock Ltd.* v. *Emerton* [1968] Ch. 94.

[49] *Ante*, p. 371.

[50] *Kennedy* v. *de Trafford* [1897] A.C. 180.

[51] *Ante*, p. 568.

[52] M. & W. point out (p. 907, n. 12) that these words literally refer to the purchaser "but plainly the phrase should be read as 'to the person *who immediately before the sale* was entitled to the mortgaged property.'" This of course includes all the other mortgagees and the mortgagor. If their titles have been extinguished under Limitation Act 1939, the mortgagee can keep the purchase money himself: *Young* v. *Clarey* [1948] Ch. 191.

[53] *Ante*, p. 535.

such an order will only be made after every opportunity has been given to the mortgagor to redeem.

Theoretically, foreclosure could become an opportunity for a mortgagee to seize upon a technical default of the mortgagor, and to obtain for himself the ownership of land worth much more than the money he loaned. Sharp practice is prevented by the court hearing; and, if the land is worth more than the amount claimed by the mortgagee, it would usually be possible to raise the necessary money from another mortgagee. The situation where hardship unavoidably occurs is that in which land prices collapse in times of depression. A mortgagee may foreclose and take the land which is *at that time* worth less than the loan, but which, as prosperity returns, becomes worth much more.

i. Foreclosure Order Nisi. A mortgagee may apply by writ or originating summons for a foreclosure order as soon as the debt becomes payable, or the contractual right to redeem expires. If the mortgagor has no valid defence to offer, judgment will be given that accounts be settled by the Master and that the mortgagor shall pay what is due at a stated time (usually within six months) thereafter. If he does so the mortgage is discharged; but if he does not do so, he shall stand thenceforth foreclosed. This is the order nisi; if, after the lapse of the six months, the money has not been repaid, an order for foreclosure absolute follows, whereupon the mortgage is realised, the mortgagee takes the fee simple, and the equity of redemption is at an end.

ii. Foreclose Down. Mortgages which have priority to that of the foreclosing mortgagee are not affected by the foreclosure. The foreclosure however affects all inferior mortgagees and the mortgagor. They must all, as we have seen, be made parties. Any one of them may redeem; if none does, they are all foreclosed.[54]

iii. Reopening a Foreclosure. Even after a foreclosure has been made absolute, it may in some circumstances be reopened; even if third parties have purchased interests in the land. The court exercises a very wide discretion, the principles of which are explained by Jessel M.R. in *Campbell* v. *Holyland*.[55] "It has been said by the highest authority that it is impossible to say *a priori* what are the terms [of the discretion]. They must depend upon the circumstances of each case. . . ." Factors mentioned by Jessel M.R. are the promptness with which the mortgagor comes to court; the fact that his failure

[54] *Ante*, p. 567; *Tylee* v. *Webb* (1843) 6 Beav. 552 at p. 557. They may however ask for a sale: L.P.A. 1925, s. 91 (2), *post*, p. 572.
[55] (1877) 7 Ch.D. 166 at p. 172.

to redeem was due to an accident; the difference between the value of the property and the loan; any special value which the property has to either of the litigants; and the court will be more reluctant to interfere against a purchaser.

We have seen that an action by the mortgagee for the recovery of the excess of the loan not covered by the value of the land foreclosed reopens the foreclosure.[56]

iv. Judicial Sale. Largely because of the uncertainty which attaches to foreclosed land, parties often prefer a judicial sale. By Law of Property Act 1925, s. 91 (2), the court has power, in an action for foreclosure, on the request of the mortgagee or anyone interested in the mortgage money or in the right of redemption, to order a sale instead of a foreclosure,[57] notwithstanding that any other person dissents from such a course.

E. Lapse of Time: Limitation Act 1939

i. General. It remains to consider, very shortly, the effect of lapse of time upon the rights of mortgagor and mortgagee. Some points of general application may be made before looking at their positions individually. The rules in (ii) and (iii) below should be read subject to these points.

(a) *Acknowledgment or Part Payment.* Generally speaking, time runs only from the last occasion on which one of the parties acknowledged the rights or title of the other, or made or received payments in respect of principal or interest.[58]

(b) *Disability.* Where a person is under a disability, the action may be brought within six years from the ending of the disability or from his death.[59] But no action may be brought to recover land or money charged on land after the expiration of thirty years.[60]

(c) *Fraud or Mistake.* When an action is based on the fraud of the defendant or is for relief from the consequences of mistake, time does not begin to run until the plaintiff has discovered the fraud or the mistake, or could with reasonable diligence have discovered it.[61]

(d) *Future Interests.* The right of a mortgagee to recover the principal sum or to foreclose the mortgaged property does not accrue, if the mortgaged property is a future interest, until the interest matures or determines.[62]

[56] *Ante*, p. 562; *Perry* v. *Barker* (1806) 13 Ves.Jr. 198.
[57] See generally *Smithett* v. *Hesketh* (1890) 44 Ch.D. 161.
[58] Limitation Act 1939, ss. 23, 24.
[59] *Ibid.* s. 22.
[60] *Ibid.* s. 22, para. (*c*).
[61] *Ibid.* s. 26.
[62] *Ibid.* s. 18 (3).

ii. The Running of Time Against the Mortgagor. The mortgagor may not bring an action to redeem land of which the mortgagee has been in possession for twelve years.[63]

iii. The Running of Time Against the Mortgagee. The mortgagee may not bring an action for foreclosure,[64] or for possession of the land [65] or for the recovery of the principal sum [66] after a period of twelve years. An action to recover arrears of interest must be brought within six years.[67] There is no limit however upon the arrears of interest which a mortgagee may retain out of the purchase money where the mortgaged property has been sold, for the interest is not recovered by action. And if the mortgagor brings an action for redemption, he will only be allowed to redeem on payment of all arrears.[68]

9. Priorities of Mortgages

A. General

If land or other property is mortgaged successively to various people, and the value of the land becomes less than the total debt secured on it, the security of one or more of the mortgagees will be inadequate. It was explained above [69] that a secured creditor may use his security to realise his debt; he is certain of repayment to the extent of the value of the security; after that he must prove as an ordinary creditor in the other assets of the debtor.

Where there are several creditors and the security is inadequate, it becomes important to establish the order in which the creditors will be entitled to make their claims against the security. No one wants to be left at the end of the queue. The problem of priority seems simple enough; the order should be that in which the mortgages were made. This of course is how the matter usually works out; but complications can arise. Should the order of time of creation be departed from if mortgagee No. 2 did not know about No. 1? Should it make any difference if this ignorance was due to the negligence of one of them? Or if No. 1 helped the mortgagor to conceal from No. 2 the existence of mortgage No. 1? And should it make any difference that one of the mortgages is a legal mortgage and another equitable?

These questions were all met and answered under the pre-1926 law. But for various reasons, the system of priorities was completely changed in the 1925 legislation, advantage being taken of the

[63] Limitation Act 1939, s. 12.
[64] *Ibid.* ss. 18 (4), 4 (3).
[65] *Ibid.* ss. 4 (3), 16.
[66] *Ibid.* s. 18 (1).
[67] *Ibid.* s. 18 (5).
[68] See *ibid.* s. 18 (4).
[69] *Ante*, p. 531.

establishment of the Land Charges Registry to provide for the registration of mortgages of land other than those "protected by a deposit of documents relating to the legal estate." [70]

The pre-1926 law however is not mere history. Many of these rules still apply on points which are not expressly covered by the new legislation [71]; and a number of perplexing problems, as we will see, can arise in the inter-relation of the two systems. The old law applies also, though subject to considerable modifications, in Northern Ireland, and in parts of the Commonwealth.

Questions of priorities of mortgages have not been much litigated in recent years. This may be due to the fact that the post-1925 system of priorities is working well. It is also no doubt due to the fact that land values have greatly increased. Periods of prosperity or inflation, or both, act to increase the nominal value of the land while the amount of the debt remains static. The tendency therefore is for the gap between the debt and value of the land to increase. And, however many mortgages there may be, no problems of priority arise so long as every secured creditor is fully protected by the value of the security.

B. Pre-1926

The basic rule of priority before 1926, as might have been expected, was that the order of priority was dependent upon the order of creation; *qui prior est tempore, potior est jure.*

This order may however be displaced by what is often described as a second and subsidiary rule that "Where the equities are equal, the law prevails." If a later legal mortgagee has notice of a prior equitable mortgage, the equities are "not equal," and the first rule, the order of creation, applies. If, however, the later legal mortgagee had no notice, actual or constructive, of the earlier equitable mortgage, the legal mortgagee prevails.

This so-called second rule is not really a rule in itself. It is in effect a contradiction of, or exception to, the first. The rules do not tell us where, in doubtful cases, the equities are considered equal; we are not told which rule to apply. Only when the issue has been decided do we know which rule has been applied.

There are also cases, as we will see, where neither rule applies. These are cases where an earlier legal mortgagee—who, on both rules, comes first—is displaced by a later equitable mortgagee. And the rules make no provision for competition between two legal or two

[70] L.C.A. 1925, s. 10 (1), Class C (i). For a general equitable charge (Class C (iii)), the wording is different; *post*, p. 589.
[71] L.P.A. 1925, s. 13; *post*, p. 592.

equitable mortgagees in a situation in which the first rule is not appropriate—as where the equities are not equal.

Rather than try to solve cases by selecting from these unsatisfactory rules, it will be better to see what the courts have done in various situations, and to examine and evaluate the reasons which they have given for doing so. We have seen that competition between legal mortgagees was not a practical problem before 1926, for the first mortgage usually conveyed to the mortgagee the mortgagor's legal estate leaving him with an equity of redemption only, an equitable estate which could be subjected to an equitable mortgage only.[72] The situations with which we are particularly concerned are those of (i) an equitable mortgage followed by a legal mortgage, (ii) a legal mortgage followed by an equitable mortgage, (iii) successive equitable mortgages. Of these (ii) and (iii) will be considered together under heading **B. ii.**[73]

Throughout the discussion, the basic principle should always be borne in mind. The order of priority is the order of creation. First made, first paid. The discussion relates to circumstances in which that order is displaced.

i. Prior Equitable, Later Legal. Any person who understands the nature of, and relation between, legal and equitable estates and interests would expect that a later legal mortgagee who has no notice, actual or constructive, of an earlier equitable mortgage would take priority over it. For all equitable interests are liable to be destroyed by a bona fide purchaser of a legal estate for value without notice, actual or constructive; and a legal mortgagee is a purchaser for value.[74] Indeed, one would have thought that that was the only rule that was needed—apart from the rules discussed in the next section where misconduct, such as fraud, misrepresentation or gross negligence on the part of the earlier mortgagee is held to be sufficient to displace him; to displace even a prior legal mortgagee, and clearly sufficient to displace a prior equitable mortgagee.

But we are here concerned with the displacement of the earlier equitable mortgagee without his having done anything wrong at all. He may be an equitable mortgagee by deposit of title deeds. By the fraud of the mortgagor, the later legal mortgagee is induced to lend money on a legal mortgage without being informed about the earlier equitable mortgage. The security is insufficient. Who should have priority? The order of time says the equitable mortgagee;

[72] *Ante*, p. 541.
[73] *Post*, p. 577.
[74] *Pilcher* v. *Rawlins* (1872) L.R. 7 Ch.App. 259; Tiley, p. 29; *ante*, p. 21.

the second rule says the legal mortgagee. On principle one would say that it all depends on whether or not the later legal mortgagee can pass the very stiff test of establishing that he is a bona fide purchaser of a legal estate for value without notice, actual or constructive.[75] The cases appear to say however that the later legal mortgagee prevails unless he was grossly negligent.[76] Such is the veneration for the legal mortgagee.

> In *Hewitt* v. *Loosemore*,[77] Robert, the mortgagor, a solicitor, deposited a lease with the plaintiff by way of equitable mortgage. He then assigned the lease on a legal mortgage to John, who was a farmer, unacquainted with legal forms. John asked whether he should not be given the lease; but Robert said that he was rather busy then, and would give it to John when he next came to market.

The question was whether the plaintiff or John took priority. John clearly did not satisfy the test laid down in *Pilcher* v. *Rawlins*[78] of a bona fide purchaser of a legal estate for value without notice. But he was a legal mortgagee; and Turner V.-C. allowed him to take before the plaintiff. "When this court is called upon to postpone a legal mortgagee," he said,[79] "its powers are invoked to take away a legal right and I see no ground which can justify it in doing so except fraud, or gross and wilful negligence . . . But I think that where bona fide inquiry is made and a reasonable excuse given, there is no ground for imputing the suspicion, or the notice which is consequent upon it."

> In *Agra Bank* v. *Barry*[80] a mortgagee was held not to be affected with notice of a prior equitable charge by deposit of title deeds, it being shown that he had inquired for those deeds, and had been put off with what was, in the circumstances, a reasonable excuse, namely, that they were at the mortgagor's residence in Ireland; the fact that this statement was untrue was insufficient to deprive the legal mortgagee of his priority.
>
> In *Oliver* v. *Hinton*,[81] the purchaser had bought from Hill property the deeds of which had been deposited on equitable mortgage with the plaintiff. On the sale, the purchaser's agent, who was not a solicitor, asked Hill, who was, if he could see the

[75] *Ante*, p. 21.
[76] *Post*, p. 577 *et seq.*
[77] (1851) 9 Hare 449.
[78] (1872) L.R. 7 Ch.App. 259.
[79] (1851) 9 Hare 449 at p. 458.
[80] (1874) L.R. 7 H.L. 135.
[81] [1899] 2 Ch. 264.

deeds, and Hill replied that they could not be seen as they related to other property.

Here the excuse was held to be insufficient. The competition was between a purchaser and a mortgagee; and the judgments proceeded partly on the doctrine of purchaser for value, and partly on the mortgage doctrine. If one may say so, Lindley M.R. was not at his best. "Who is it that now claims to override her [the mortgagee's] charge? The only person who can do so, if he has acquired his title subsequently to hers, is a bona fide purchaser for value without notice of her charge.[82] . . . To deprive a purchaser for value without notice of a prior incumbrance of the protection of the legal estate it is not, in my opinion, essential that he should have been guilty of fraud; it is sufficient that he has been guilty of such gross negligence as would render it unjust to deprive the prior incumbrancer of his priority."[83]

It appears therefore that a later legal mortgagee was able, by virtue of his legal estate, to claim priority over an earlier equitable mortgagee, if he did not know of the earlier mortgage and provided that he was not guilty of fraud or gross negligence. A reasonable excuse for non-production of the deeds would do. The situation was unsatisfactory. It would have been much better to have applied the purchaser for value rule. The uncertainty of the position haunts the law today, as we will see.[84] If the earlier equitable mortgage was by deposit of title deeds, and therefore not registrable, do these rules still apply? Or have time and the 1925 legislation changed the rule to one of constructive notice? What rules apply after 1925, either between two legal mortgagees, the first of which takes the title deeds; or between two equitable mortgagees?

ii. Conduct of Prior Mortgagee Meriting Postponement. Fraud, Misrepresentation and Gross Negligence. An earlier mortgagee may lose his priority in favour of a later one if he is guilty of fraud, misrepresentation or gross negligence. This is true of all types of earlier mortgagees. The question is especially relevant to the case of a prior legal mortgagee in competition with a later equitable. It is submitted below that the rules are the same for the case of two successive equitable mortgages. They apply also to the case just discussed of prior equitable, later legal, but, as we have seen, special considerations apply to that case, and misconduct of the prior equitable mortgagee of the type now under consideration may have the effect of making

[82] *Ibid.* at p. 273.
[83] *Ibid.* at p. 274.
[84] *Post*, p. 591.

the later legal mortgagee a bona fide purchaser for value without notice.

The justification for the rule displacing earlier mortgagees is that mortgages come under the jurisdiction of equity, and inequitable conduct will deprive a mortgagee of his priority. Such conduct is usual in connection with the dealing by the first mortgagee with the title deeds, for it is by inefficient handling of the deeds that later mortgagees are commonly misled; but the doctrine is not necessarily confined to such cases.

(a) *Fraud.* Participation by an earlier mortgagee in any scheme to deceive the later mortgagee will deprive the earlier mortgagee of his priority.[85] Failure to obtain the title deeds with a view to permitting the mortgagor to appear as unincumbered owner would have this effect[86]; as will a returning of the deeds to the mortgagor with like intent.[87] The fraud need not however be related to the title deeds.

Fry L.J. said in *Northern Counties of England Fire Insurance Co.* v. *Whipp*[88] that fraud, whether by the earlier mortgagee or his agent, was the only reason to postpone a prior legal mortgage. As explained below, this is usually thought to be too limited a view. But no doubt is cast on the proposition that fraud, once proved, is sufficient.

(b) *Misrepresentation, Agency, Estoppel.* If an earlier mortgagee permits the mortgagor to appear to third parties to be free of that mortgage, then the third parties, if they have no notice of any limitation in the mortgagor's apparent power to deal with the land as unincumbered owner, are entitled to deal with him on the footing that his ostensible position is the true position. This is an example of the operation of the ordinary principles of agency and estoppel.[89] The later mortgagee may take priority over the earlier mortgagee who allowed the mortgagor to appear to be unincumbered. There is no necessity to prove fraud on the part of the earlier mortgagee. There will usually be fraud on the part of the mortgagor; but this is not essential, and an innocent but mistaken assumption of authority by him would be sufficient.

Such situations usually arise where the earlier mortgagee allows the title deeds to remain with the mortgagor, or has returned them to him with a limited authority to raise a certain sum of money on

[85] *The Thatched House Case* (1716) 1 Eq.Ca.Abr. 321.
[86] *Colyer* v. *Finch* (1856) 5 H.L.Cas. 905 at p. 924.
[87] *Northern Counties of England Fire Insurance Co.* v. *Whipp* (1884) 26 Ch.D. 482.
[88] (1884) 26 Ch.D. 482.
[89] *Rimmer* v. *Webster* [1902] 2 Ch. 163; *Tsang Chuen* v. *Li Po Kwai* [1932] A.C. 715; *Re King's Settlement* [1931] 2 Ch. 294.

further mortgage, and the mortgagor has borrowed an excessive amount. The leading case is *Perry Herrick* v. *Attwood*.[90]

> John Attwood, being heavily indebted to the trustees of a marriage settlement and also to his sisters, executed a legal mortgage of land to his sisters to secure the amount due to them. The deeds were retained in order to allow John to give security to the trustees. He deposited them with the solicitors to the trustees and, later employing the same solicitors, made several other legal mortgages. The question was whether the legal mortgage to the sisters lost the precedence to which it would be entitled in order of time.
>
> The House of Lords held that, even without proof of fraud, the sisters were postponed, Lord Cranworth saying[91]: ". . . if a person taking a legal mortgage chooses to leave the deeds with the mortgagor, not through negligence or through fraud, but with the intention of enabling him to raise a sum of £15,000 which is to take precedence of the legal mortgage, the mortgagee cannot, as against subsequent mortgagees, complain if, instead of £15,000, the mortgagor raises £50,000, because he has himself put it into his power to raise any sum of money he pleases."

It is immaterial whether the deeds are retained or returned; whether the retention was intentional or negligent[92]; or whether the misrepresentation occurred by the use of the deeds or by leaving with the mortgagor a receipt for the mortgage money.[93] Similarly, there need be no express agency. The agency will be implied where the deeds are intentionally or negligently left in the wrong hands.[94] There is however no implied agency where the mortgagor leaves the deeds in the hands of his solicitor[95]; or, where he is a beneficiary, in the hands of his trustee.[96]

(c) *Gross Negligence.* It should be emphasised that we are concerned here with the circumstances in which the gross negligence of a prior mortgagee will displace him. This is a different point from the earlier discussion of the circumstances in which the absence of gross negligence of a later legal mortgagee will allow him to take

[90] (1857) 2 De G. & J. 21; see also *Abigail* v. *Lapin* [1934] A.C. 491.
[91] *Ibid.* at p. 39.
[92] *Clarke* v. *Palmer* (1882) 21 Ch.D. 124.
[93] *Bickerton* v. *Walker* (1885) 31 Ch.D. 151; *Rimmer* v. *Webster* [1902] 2 Ch. 163; *cf. Rice* v. *Rice* (1854) 2 Drew. 73 (receipt for purchase money and sale).
[94] *Briggs* v. *Jones* (1870) L.R. 10 Eq. 92; *Dixon* v. *Muckleston* (1872) L.R. 8 Ch. App. 155 at p. 160; *Brocklesby* v. *Temperance Permanent B.S.* [1895] A.C. 173 at p. 181; *Rimmer* v. *Webster* [1902] 2 Ch. 163; *Abigail* v. *Lapin* [1934] A.C. 491.
[95] *Re Vernon, Ewens Co.* (1886) 33 Ch.D. 402.
[96] *Shropshire Union Railway Co.* v. *R.* (1875) L.R. 7 H.L. 496.

precedence over an earlier equitable mortgagee.[97] The test in both cases, however, is said to be that of gross negligence. It is uncertain whether the degree is the same; if the submission above is correct that the latter case should be treated as one for the application of the purchaser for value rule, the issue would be quite different. However that may be, there is a further uncertainty; dealing solely with the question relevant here, of the degree of negligence by an earlier mortgagee necessary to displace him, is the degree the same for replacing an earlier legal by a later equitable, an earlier equitable by a later legal, and as between two equitable mortgagees?

To displace an earlier legal mortgagee by a later equitable mortgagee the negligence of the former must certainly be gross. Indeed, Fry L.J., as noted above,[98] doubted whether even gross negligence would have this effect. He said[99]: ". . . the court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessless or want of prudence on the part of the legal owner."

> In *Northern Counties of England Fire Insurance Co.* v. *Whipp*[1] one Crabtree, who was the manager of the plaintiff company, executed legal mortgages of freehold land to the company. The title deeds were kept in the company's safe. Crabtree, as manager, was in possession of a set of keys; he extracted the deeds and deposited them with Mrs. Whipp as security for a further loan. The Court of Appeal held that the Company took priority over Mrs. Whipp. This was a case of failure to *re*tain the deeds rather than of failure to *ob*tain, and could be distinguished on that ground. There appears however to be no rational basis for such a distinction and it seems clear on the cases that gross negligence, without fraud, is sufficient to postpone an earlier mortgagee.[2]

If that is correct, the next question is whether a greater degree of negligence is needed to postpone a prior legal than is necessary to postpone a prior equitable. Maitland hinted that a lower degree of negligence would be sufficient to postpone an equitable mortgagee.[3]

97 *Ante*, p. 575.
98 *Ante*, p. 578.
99 *Northern Counties of England Fire Insurance Co.* v. *Whipp* (1884) 26 Ch.D. 482 at p. 494.
1 (1884) 26 Ch.D. 482.
2 *Hunt* v. *Elmes* (1860) 2 De G.F. & J. 578 at p. 586; *Colyer* v. *Finch* (1856) 5 H.L.C. 905; *Clarke* v. *Palmer* (1882) 21 Ch.D. 124; *Oliver* v. *Hinton* [1899] 2 Ch. 264; *Hudston* v. *Viney* [1921] 1 Ch. 98; *Walker* v. *Linom* [1907] 2 Ch. 104.
3 Maitland, p. 127 *et seq.*; *cf.* Fry L.J. in *Northern Counties Fire Insurance Co.* v. *Whipp* (1884) 26 Ch.D. 482 at p. 487, with Kay J. in *Taylor* v. *Russell* [1891] 1 Ch. 8 at p. 17.

But the better view is that the degree is the same. Of course negligence by an earlier equitable mortgagee followed by a later legal may bring into operation the rules discussed in the previous section.[4] Judging the matter solely in relation to the postponement of the earlier mortgagee on account of *his* negligence, in every case in which equitable mortgagees have been postponed because of their negligence, their conduct would have been visited with a similar fate had their mortgages been legal.[5]

(d) *Negligence by Trustees in Relation to Title Deeds.* In *Shropshire Union Railway Co.* v. *R.*[6] the House of Lords held that a beneficiary would not be displaced where he left the title deeds in the hands of his trustees and the trustees wrongfully parted with them—as for example, to create a further equitable mortgage. However, in *Walker* v. *Linom*,[7] Parker J. held that where land was conveyed to trustees who failed to obtain the title deeds, the trustees (and thus the beneficiaries) were postponed to a purchaser from a later equitable mortgagee. It appears therefore as if the beneficiaries' position depends on whether the trustees obtained the deeds and wrongly parted with them, or whether they failed to obtain them. There would be little reason in such a distinction. It appears however to have become established in the 1925 legislation.[8]

(e) *Failure by Legal Mortgagee to Obtain the Deeds on the Redemption of a Prior Equitable Mortgage.* We have seen that an earlier legal mortgagee may be displaced on grounds of fraud, misrepresentation or gross negligence if he fails to take steps to obtain the title deeds. Is he similarly in danger if, when he takes his mortgage, the deeds are deposited with a prior equitable mortgagee of whom he knows, and he fails to require that prior equitable mortgagee to hand the deeds over to him when the prior equitable mortgage is redeemed? It would be hard to prejudice the legal mortgagee for failing to get the deeds in such circumstances; but the legal mortgage in such circumstances becomes a dangerous trap to later incumbrancers.

[4] For slight negligence by an earlier equitable mortgagee may be the basis of a "reasonable excuse" given by the mortgagor to a later legal mortgagee; or may enable the later legal mortgagee to prove himself to be a bona fide purchaser for value without notice.

[5] For an analysis of the leading authorities, see Waldock, p. 397 *et seq.*

[6] (1875) L.R. 7 H.L. 496. See also *Caritt* v. *Real and Personal Advances Co.* (1889) 42 Ch.D. 263, where the same principle was applied in a case in which the mortgagee-trustee obtained an advance for himself by depositing the deeds.

[7] [1907] 2 Ch. 104; the reasoning on which Parker J. based his decision was much criticised: see *per* Neville J. in *Coleman* v. *London County and Westminster Bank Ltd.* [1916] 2 Ch. 353 at p. 360; Waldock, p. 400; see also *Lloyds Bank* v. *Jones* (1885) 29 Ch.D. 221.

[8] L.P.A. 1925, s. 13; *post*, p. 592.

In *Grierson* v. *National Provincial Bank*,[9] A, a leaseholder, deposited his lease with his Bank as security for a loan, and then gave a legal mortgage of the premises to B, expressly subject to the Bank's charge. B gave no notice of his mortgage to the Bank. A paid off the bank, but deposited the recovered lease with C to secure a loan from him. C had no notice of B's mortgage. It was held that B had not been guilty of such misconduct as to postpone him to C.

(f) *Successive Equitable Incumbrancers.* As between competing equitable mortgagees, the first of the main rules given above is the only one which can apply. There is no legal estate to which special priority should be given. The rule *qui prior est tempore potior est jure* thus applied to all cases except where the fraud, misrepresentation or gross negligence was sufficient to displace him. If the previous submission is right that the rules for fraud, misrepresentation and gross negligence are the same for the displacement of equitable mortgagees as for displacement of prior legal mortgagees, the present question is covered by the discussion in sections (a) (b) and (c) above.

(g) *Equitable Mortgage of Legal Estate and Mortgage of Equitable Interests.* No distinction was made, before 1926, in the rules for determining priorities between equitable mortgages of a legal estate and mortgages (necessarily equitable) of equitable estates in land. We shall see that a basic distinction between these two forms of equitable mortgage was introduced in 1925.[10]

iii. The Doctrine of Tacking. This doctrine has been rationalised by the Law of Property Act 1925,[11] but it is necessary to examine it as it once was because the present law is unintelligible without a knowledge of the history of the doctrine. The doctrine was the outcome of the extreme respect shown by equity for the legal estate. It was established by equity at the end of the seventeenth century.[12] It might take one of two forms.

(a) *First Mortgagee Tacking Subsequent Advance.* Suppose that Blackacre was mortgaged successively to A and B. A made a second advance to the mortgagor on the same security. Could he rank before B in respect of both charges? Yes, he could "tack" together the two charges, and claim to be paid off the sum of the two, before a penny was paid to B, provided that, at the time of making his second advance, he had no notice of B's mortgage. Later knowledge of B's mortgage did not in any way prejudice his right to tack.

[9] [1913] 2 Ch. 18.
[10] *Post*, pp. 589, 594.
[11] *Post*, p. 595.
[12] *Hedworth* v. *Primate* (1662) Hardres 318; *Marsh* v. *Lee* (1670) 2 Ventr. 337.

A banker-mortgagee would often desire to provide in the same transaction for security to cover both the present overdraft of a customer and also possible future advances to him.

But it was laid down by the House of Lords in *Hopkinson* v. *Rolt* [13] that a first mortgagee, whose mortgage was made to cover what was then due and also future advances within a fixed amount, could not claim to be repaid such advances in priority to a second mortgagee, of whose mortgage he had notice at the time when he made them.

Even if the mortgagee bound himself to make further advances, he was unable to gain priority over a subsequent mortgagee, unless he could show that, at the time of making a further advance, he had no notice of that mortgage. This rule used to be known as the rule in *West* v. *Williams.*[14]

(b) *Tabula in Naufragio.* The right to tack could be invoked by a third mortgagee. The legal estate was regarded as *tabula in naufragio*, a plank in a shipwreck, to be scrambled for by drowning equitable mortgagees. Thus, if Blackacre were mortgaged successively by legal mortgage to A, and then by equitable mortgage, first to B and then to C, the normal order of priority would be the order of creation. But C could change this. If, at the time when he made his *original* advance, he had no notice of B's mortgage, he could pay off A, and "squeeze out" B, by claiming to be paid his own advance as well as that made by A, before B received a penny. The right to tack was regarded purely as a reward for the third mortgagee's superior diligence, and it was laid down in *Taylor* v. *Russell* [15] that it is not essential that the incumbrancer claiming the benefit of the doctrine should give value upon the acquisition of the legal estate.

Tacking was not possible where it would be inequitable to get in the legal estate,[16] as where the third mortgagee had notice that the first mortgagee was trustee for the second, or that the mortgagor was himself a trustee for a third party.

The initiative lay always with a later mortgagee, and never with the mortgagor. Thus where a mortgagor who, while retaining the legal estate, gave successive equitable mortgages of it to several persons, could not give an advantage to one of them by subsequently transferring to him the legal estate.[17] But it is open to incumbrancers

[13] (1861) 9 H.L.Cas. 514.
[14] [1899] 1 Ch. 132; *post*, p. 596.
[15] [1892] A.C. 244.
[16] *Harpham* v. *Shacklock* (1881) 19 Ch.D. 207; *Taylor* v. *Russell* [1892] A.C. 244; *Taylor* v. *London and County Banking Co.* [1901] 2 Ch. 231; *Perham* v. *Kempster* [1907] 1 Ch. 373.
[17] *Sharples* v. *Adams* (1863) 32 Beav. 213.

to agree among themselves to alter their priorities, and this possibility is, as we shall see, expressly safeguarded by the Law of Property Act 1925.[18]

iv. The Rule in Dearle v. Hall. We have seen that priority among mortgagees of an equitable interest in land (including leasehold) was, prior to 1926, regulated according to the maxim *qui prior est tempore potior est jure,* and the exceptions thereto.[19] Priorities among assignees and mortgagees of equitable interests in pure personalty were governed by quite a different rule, the rule in *Dearle* v. *Hall.*[20]

(a) *Statement of the Rule.* It may be simply stated thus:

> As between assignees or incumbrancers of an interest in a trust fund of pure personalty (including an interest under a trust for sale[21]), priority depends on the order in which notice is received by the debtor or trustees.

The rule only operated however if the equities were in other respects equal—a proposition running through the whole law of priorities. A later assignee or incumbrancer could not, by giving earlier notice, obtain priority over an earlier assignee or incumbrancer of whose interest he was aware *at the time when he paid his money.*[22] He could, on the other hand, give his notice after hearing of an earlier assignment or incumbrance in respect of which notice had not been given. The principle is similar to that discussed in connection with *West* v. *Williams.*[23]

(b) *Bases of the Rule.* The rule rests on two main bases:

(i) If the trustees do not know of an assignment or mortgage, there is no way in which a later assignee or mortgagee can find out about it; and the owner of an equitable interest in personalty could fraudulently assign or charge his interest to a succession of assignees or mortgagees.[24]

(ii) If the trustee is not to be safe in paying money arising under the trust to any assignee for fear that there may be another prior claim affecting the property, he will never be safe in paying anybody at all. Such a result would stultify the whole doctrine of assignment of choses in action in equity.[25]

18 *Post*, p. 595.
19 *Ante*, p. 574 *et seq.*
20 (1828) 3 Russ. 1. See comments of Lord Macnaghten in *Ward* v. *Duncombe* [1893] A.C. 369 at p. 392 and in *B. S. Lyle Ltd.* v. *Rosher* [1959] 1 W.L.R. 8. See also *Re Freshfield's Trusts* (1879) 11 Ch.D. 198; *Hill* v. *Peters* [1918] 2 Ch. 273.
21 *Lee* v. *Howlett* (1856) 2 K. & J. 531.
22 *Spencer* v. *Clarke* (1878) 9 Ch.D. 137; *Re Holmes* (1885) 29 Ch.D. 786.
23 [1899] 1 Ch. 132; *ante*, p. 583.
24 *Per* Wright J. in *Re Lake* [1903] 1 K.B. 151 at p. 154.
25 *Post*, p. 641.

(c) *Unfortunate Effect of Stressing Diligence of the Mortgagee who Gave Notice.* Plumer M.R., in deciding *Dearle* v. *Hall*,[26] appreciated that it was desirable to underline either the diligence of the mortgagee who had given notice or the negligence of the one who had not. If he had underlined the latter, subsequent cases might have proceeded on the principle that the chance of priority is lost by gross negligence. But he preferred to lay stress on the former, and the unfortunate result was to turn the ear of the trustees into a *tabula in naufragio*.[27] A mortgagee, provided he advanced his money without notice of a prior mortgage, could give himself priority by giving notice after hearing that the earlier mortgagee had failed to do so.[28] And cases could also arise where notice, once given, was, or subsequently became, ineffectual, because of the death or retirement of the trustees to whom it was given.

(d) *Importance of Giving Notice to All the Trustees.* Notice given to all the trustees was a valid notice for all time, even though all the trustees had since died or retired, and had not passed the information to their successors.[29]

Where, however, an incumbrancer gave notice to one or some but not all of the trustees, the notice was valid for the period during which such trustee or trustees continued to act. After they ceased to act, the notice was valid only if they had in fact passed it on; if not, it was void.[30] For example:

Suppose that A, B and C are trustees of land which is mortgaged to four successive mortgagees, Nos. 1, 2, 3 and 4, none of whom was aware of the other mortgages when he made his advance.

No. 1 gives notice to A, B and C; No. 2 gives notice to A only; A then retires and is replaced by D, who does not hear of A's mortgage; No. 3 gives notice to B; No. 4 gives notice to B, C and D.

The order of priority is (i) No. 1, for he gave notice to all the trustees; (ii) No. 3, for his notice to B is valid against No. 4 because B is still in office. The notice given by No. 2 is void against No. 3 and No. 4; (iii) No. 4; (iv) and lastly No. 2, whose notice to A is no longer effective after A's retirement from the trust.

In such a situation No. 2 loses a priority which he once enjoyed. He would have and would always retain a priority over any later

[26] (1828) 3 Russ. 1.
[27] *Ante*, p. 583.
[28] This could not be done by a judgment creditor (*Scott* v. *Lord Hastings* (1858) 4 K. & J. 633), an assignee in bankruptcy (*Re Anderson* [1911] 1 K.B. 896), nor by a volunteer (*Justice* v. *Wynne* (1861) 12 Ir.Ch.App. 289).
[29] *Ward* v. *Duncombe* [1893] A.C. 369; *Re Wasdale* [1899] 1 Ch. 163.
[30] *Ward* v. *Duncombe* [1893] A.C. 369. The incumbrancer should give notice to the new trustees; *Timson* v. *Ramsbottom* (1837) 2 Keen 35.

incumbrancer who became a mortgagee during A's continuance in office. In the example, however, No. 3's mortgage was not made until after A's retirement.

These rules can lead to an apparently insoluble problem. Suppose, on the facts of the previous example, that notice was given as follows: No. 1 to A; No. 2 to A, B, and C; A retires and is replaced by D; No. 3 to B, C, and D.

Here, No. 1 takes priority over No. 2 because A is still in office; No. 2 takes priority over No. 3 because he gave notice to all the trustees; but No. 3 takes priority over No. 1 because A was no longer in office when mortgage No. 3 was made. Thus each has priority over the others, and they appear to revolve in circles like a kitten chasing its tail.

This problem was foreseen in *Ward* v. *Duncombe*,[31] and losing counsel[32] used this situation as a *reductio ad absurdum* argument when arguing against the rule that notice to A should remain valid so long as A remained in office. Lindley M.R., however, thought that the matter could be solved by an application of the doctrine of subrogation.[33]

There is another reason why it is important to give notice to all the trustees. By the doctrine of *Stocks* v. *Dobson*,[34] a debtor, before receiving notice of an assignment, is perfectly at liberty to go on paying the original creditor, and in *Bence* v. *Shearman*[35] it was held that once a debtor in this position has given his creditor a cheque for the full amount of the debt, he can simply disregard notice from a prior assignee. Thus a trustee who did not have notice, but whose predecessor did, might prejudice an assignee by making payments to the assignor. This could be a substantial problem before 1926, for effective notice might reach the trustee informally, as by reading a newspaper.[36] This made it very difficult to establish whether a trustee had received notice or not, and whether or not the notice had been passed to his successor. The Law of Property Act 1925, s. 137 (3), provides that no priority may be gained unless the notice is in writing. This will mean in practice that there is a permanent record of the notice and that successor trustees will be informed. The subsection deals in terms with questions of priority; and there is nothing to say that a trustee may disregard informal notice from an assignee.

31 [1893] A.C. 369.
32 In the Court of Appeal, *sub nom. Re Wyatt* [1892] 1 Ch. 188.
33 *Post*, p. 593; *Benham* v. *Keene* (1861) 3 De G.J. & F. 318.
34 (1853) 4 De G.M. & G. 11.
35 [1898] 2 Ch. 582; see also *Phipps* v. *Lovegrove* (1873) L.R. 16 Eq. 80; *Hallows* v. *Lloyd* (1888) 39 Ch.D. 686.
36 *Lloyd* v. *Banks* (1868) L.R. 3 Ch.App. 488; *Ipswich Money Club* v. *Arthy* [1920] 2 Ch. 257.

He must presumably still act on informal notice when deciding to whom to pay money arising under the trust; and should inform later assignees of his knowledge of the first assignment.[37]

(e) *Trustees under no Duty to Give Information.* Before 1926, a trustee was under no duty to give information in answer to inquiries concerning notices which he had received. An inquiry of the trustee might therefore end in a mere refusal. Even if the trustee did volunteer information, he was under no duty to take reasonable care to ascertain the facts upon which his answers were based. He would be liable only for fraud. His statement, however, could work an estoppel if it was clear and unambiguous in its assertion that no incumbrances existed other than those which he disclosed.[38] The inquirer could thus place little reliance upon the statements of the trustee. His position has been much improved by developments in the law in and since 1925.[39]

C. The Legislation of 1925

i. General. The 1925 legislation introduced an entirely new system of priority of mortgages. There has been little litigation on the question since 1925. This may be due, as explained above, to the absence of a problem of priorities because of the rise in land values. It may also be that, although the new system has a number of obvious theoretical flaws, it works reasonably well in practice.

The main objective of the new system was to ensure that a later mortgagee or other purchaser should know exactly what he must do to discover earlier incumbrances. The solution, in short, is that he must: (a) search the Land Charges Register which was set up by the Land Charges Act 1925, and (b) account for the custody of the title deeds. Having done these two things correctly, he can ignore incumbrances whether legal or equitable which do not come to light as a result of these inquiries.

As we shall see, the policy does not work out as simply as was hoped; but the principle should be borne in mind in the more detailed account which follows.

ii. Legal and Equitable Mortgages of Legal Estates in Land. The insistence in the 1925 legislation upon the retention of a legal estate in the mortgagor means as has been explained,[40] that the mortgagor can create a series of legal mortgages. There is now, therefore, no

[37] Waldock, p. 433.
[38] *Low* v. *Bouverie* [1891] 3 Ch. 82.
[39] *Hedley Byrne* v. *Heller* [1964] A.C. 465; L.P.A. 1925, s. 137 (8) (9); *post*, p. 594.
[40] *Ante*, p. 535.

special precedence to be given to a legal mortgagee. In Gilbertian phrase, " when everyone is somebody, then no one's anybody." That particular complication was thus removed from the problem of priorities, and the conflict between two basic rules no longer exists. It would have been possible to base the system on the first rule only: *Qui prior est tempore potior est jure.* However, other difficulties would remain. The order of time would still be liable to be changed by the operation of doctrines relating to fraud, misrepresentation and gross negligence; and, as we have seen, the difficulties in practice of determining when such doctrines apply is very great.

(a) *Priority between Registrable Mortgages.* The setting up of the Land Charges Register made it possible to establish a system under which priority depends upon order of registration. Law of Property Act 1925, s. 97, so provides:

> " Every mortgage affecting a legal estate in land made after the commencement of this Act, whether legal or equitable (not being a mortgage protected by the deposit of documents relating to the legal estate affected), shall rank according to its date of registration as a land charge pursuant to the Land Charges Act 1925." [41]

So long as mortgagees register their mortgages when the mortgage is created, this rule is the same as that of priority being dependent upon order of creation. But complications arise if mortgages are registered after a lapse of time. For example: If in the case of a mortgage to A followed by a mortgage to B, B registers, and then A registers, the order is clearly B, A.

What, however, should be done if the order of events is: mortgage to A; mortgage to B; registration by A; registration by B?

Section 97 suggests A, B; so would the rule of priority according to order of creation. But is this fair to B? What could B have done to discover A's mortgage? We saw above that the basic principle of the 1925 system of priorities is that later mortgagees must be able to find out about earlier incumbrances.

Land Charges Act 1925, s. 13 (2), provides:

> " A land charge of . . . Class C . . . shall . . . be void as against a purchaser of the land charged therewith, . . . unless the land charge is registered in the appropriate register before the completion of the purchase."

And, by section 20, " purchaser " is defined to mean " any person

[41] *Post*, p. 589.

(including a mortgagee or lessee) who, for valuable consideration, takes any interest in land or in a charge on land."

In the example given above, section 13 (2) would give the opposite answer to that reached by Law of Property Act 1925, s. 97. The better view, and the one accepted by most writers, is that section 13 (2) will govern. A's mortgage would be void against B, and B will take priority. A is not saved by registering before B. The effect of the provisions, read together, is, not that priority is gained by registration, but that priority is lost by failure to register.

(b) *Priority between Registrable and Non-Registrable Mortgages.* The discussion so far has been confined to registrable mortgages. It might have been wise to have provided that all mortgages should be registrable. But the great convenience of the equitable mortgage by deposit of title deeds and the fact that many such mortgages are made to give security for short-term loans were no doubt reasons why such mortgages were excluded from the requirement of registration. After all, the later mortgagee would not be jeopardised; for he could discover the earlier mortgage by the mortgagor's inability to produce the title deeds. The mortgagee would then lend no money until the custody of the title deeds was accounted for.

The Land Charges Act 1925, s. 10 (1), provides for the registration of the following mortgages:

> "Class C: (i) Any legal mortgage not being a mortgage protected by a deposit of documents relating to the legal estate affected, . . . (in this Act called a 'puisne mortgage'): and . . . (iii) Any other equitable charge, which is not secured by a deposit of documents relating to the legal estate affected and does not arise or affect an interest arising under a trust for sale or a settlement and is not included in any other class of land charge (in this Act called 'a general equitable charge')."

The legislation says nothing of the priority of non-registrable mortgages—*i.e.*, those protected by a deposit of the title deeds. The intention obviously is that such a mortgage should take priority according to the date of the deposit—which in the case of a mortgage created by the deposit is the same as the date of creation [42]; and it is from that moment that a later mortgagee will be put on his guard because of the absence of the title deeds. Such is assumed to be the correct position.

Thus, to summarise, priority depends, in the case of mortgages protected by deposit, upon the date of the deposit; in the case of other

[42] But may not be so in the case of a legal mortgage where the mortgagee takes the deeds. *Post*, p. 590.

(registrable) mortgages upon the date of registration unless this date is displaced by the rule of Land Charges Act 1925, s. 13 (2), that an unregistered registrable mortgage is void against a purchaser of any interest in the land.

(c) *Problems.* There are however a number of problems which arise in the application of this system.

(i) The legislation does not expressly enact the rule above laid down for priority of mortgages in which the mortgagee receives custody of the title deeds.

(ii) The dates of the mortgage and of the deposit may be different where a legal mortgagee takes the deeds. In the intervening time, the mortgage is registrable, and Land Charges Act 1925, s. 13 (2), applies; and a mortgage created in the intervening time between the first mortgage and its registration will take priority over it.[43] What of later mortgages subsequent to the date of deposit? Presumably they take after the first mortgagee, as they would do if the first mortgage had been registered; but there is no statutory provision to cover this question.

(iii) What is meant by "protected by a deposit of documents relating to the legal estate affected": and "secured by a deposit of documents relating to the legal estate affected"? Is it necessary that the mortgagee should have deeds which constitute a perfect title? If that were the rule, an owner whose title was not perfect could not create a mortgage by deposit. Is it sufficient if the mortgagee takes all those which the mortgagor had? Or those which the mortgagor disclosed to him? And if a mortgagee may be protected by the deposit of deeds which establish anything less than a perfect title, what is the position of another mortgagee with whom the remainder of the deeds may be deposited? Are both "protected" or "secured"; or is neither? The statutory system assumes that the deeds will be deposited with one mortgagee only. It was clear however under the pre-1926 law that a deposit of something less than all the deeds was a valid mortgage.[44] The ramifications of this rule upon the system of registration do not appear to have been fully appreciated in 1925.

(iv) If a mortgagee is protected by a deposit of title deeds, what is the position of a later mortgagee who, without negligence, fails to find out about the mortgage by deposit? There are three possible solutions:

[43] Priority may be assured by the use of a priority notice; L.P.(A.)A. 1926, s. 4; Waldock, p. 417.

[44] *Roberts* v. *Croft* (1857) 24 Beav. 223; *Dixon* v. *Muckleston* (1872) L.R. 8 Ch.App. 155; Waldock, pp. 52–53; "the precise meaning of 'protected' must be a matter for speculation": Waldock, p. 423.

First: If the first mortgage is an equitable mortgage by deposit of title deeds and the later mortgage is a legal mortgage, the situation is one that was solved before 1926 by allowing the later legal mortgagee priority unless he was himself grossly negligent.[45] He took priority if he was given a reasonable excuse for non-production of the deeds. These cases have never been overruled, nor is their effect repealed by the Act. They may still apply. But their *raison d'être* no longer exists. The legal mortgagee is no longer the " somebody " he used to be.

Second: It is submitted that those cases should no longer be followed, and that the matter should now be treated under the principle of a bona fide purchaser of a legal estate for value without notice. The later legal mortgagee should be bound unless he can pass the stringent tests laid down in *Pilcher* v. *Rawlins*.[46] Many of the situations in which such a principle would apply would be cases where the first mortgagee was guilty of fraud, misrepresentation or gross negligence; but the principle would not be limited to such cases.

Third: If the earlier mortgage is legal, or if both mortgages are equitable, the general doctrine of a bona fide purchaser of a legal estate for value without notice no longer applies. In such situations, the earlier mortgage (protected by deposit of the documents) presumably retains its priority unless displaced under the old rules relating to fraud, misrepresentation or gross negligence. If that is so, the question again arises whether such doctrines apply equally to the cases of first legal, later equitable, of two equitable, and (the new situation) of two legal. It was submitted above[47] that no distinction should be made in the application of these doctrines to these different situations. The arguments in favour of such a view are all the stronger now that there is less distinction between the first legal and all other mortgages.

(v) If a mortgage is " protected " or " secured " by a deposit of the title deeds, does he lose his priority if he loses possession of the deeds? If he parts with them in circumstances amounting to fraud, misrepresentation or gross negligence, he will no doubt be postponed.[48] If the title deeds are stolen from him without his fault or burned, it is difficult to know what the court will do. If the deeds are no longer deposited with him, it is difficult to see how he can be " protected " or " secured " by a deposit of the documents; if he is not so protected, the mortgage becomes registrable. If the deeds are stolen without his knowledge or fault, there is no way in which he can discover the duty to register. However, if they come into the hands of the mortgagor, the land will appear to a later mortgagee to

[45] *Ante*, p. 575.
[46] (1872) L.R. 7 Ch.App. 259; *ante*, p. 24.
[47] *Ante*, p. 581.
[48] Waldock, pp. 419–421, and cases there cited.

be unincumbered. As indicated above, if the first mortgage is equitable and the later one is legal, the solution may be to give priority to the later bona fide legal mortgagee as a purchaser of a legal estate for value without notice. The equitable mortgagee is just unlucky; but that can happen to holders of any equitable interest. But no such solution is available in other circumstances—as where the first mortgage is legal, or where both are equitable.

Law of Property Act 1925, s. 13, provides that

> "This Act shall not prejudicially affect . . . any question arising out of or consequent upon any omission to obtain or any other absence of possession by any person of any documents relating to a legal estate in land."

It is possible that this section preserves the old law as to loss of priority, once gained, by subsequent failure to keep the deeds. It would not apply however to a failure to *ob*tain the deeds, for the Land Charges Act 1925 specifically makes such a mortgage registrable, and provides that it shall be void against later purchasers unless registered. Whether a distinction must now be made between cases of failure to *ob*tain and failure to *re*tain title deeds, and between cases of first equitable mortgage, later legal and all other cases must remain an open question.[49]

(vi) Are mortgages "protected" by deposit of documents registrable as estate contracts? [50]

Since there are a number of dangers inherent in the establishment of the priority of a mortgage protected by a deposit of documents, the question arises whether such a mortgagee could not register the mortgage, and obtain a guarantee of priority by that method. A first *legal* mortgagee in practice takes the title deeds; but he has no need to; he can choose either to take the deeds and make the mortgage non-registrable, or not to take them and protect himself by registration. The only mortgagee who *must* take the title deeds in order to effect the mortgage is an equitable mortgagee by deposit of title deeds. Without the deposit, there is no mortgage. As the deeds are deposited, he cannot register the mortgage as a general equitable charge.

A deposit of title deeds with the intent that they shall be kept as a security is treated by equity as a mortgage because equity construes the transaction as a contract to create a mortgage. It is thus a con-

[49] Waldock, pp. 420–421.

[50] (1930) 69 L.J.News 227 (J. M. Lightwood); Prideaux, *Precedents* (25th ed.), Vol. 2, p. 610; (1941) 7 Camb.L.J. 250 (R. E. Megarry); (1949) 10 Camb.L.J. 241 at p. 245 (S. J. Bailey); Cheshire, pp. 627–628; M. & W., pp. 964–965; Waldock, pp. 425–428; (1962) 26 Conv.(N.S.) 445 at pp. 446–449 (R. G. Rowley); *Emmet on Title* (15th ed.), p. 954.

tract to create a legal estate and is within the definition of an estate contract in the Land Charges Act 1925, s. 10, Class C (iv). It would appear that, so long as the Registry will accept it, registration is a prudent measure.

It is unlikely, however, in spite of the logical attraction of the argument, that the court would hold that an equitable mortgage by deposit was properly so registered. Such a holding would mean that, as registrable mortgages, they must be void against later purchasers unless registered.[51] Such a ruling would place in jeopardy all existing equitable mortgages by deposit which have not been registered, and would destroy the advantages of the present very convenient system of effecting short-term mortgages by deposit.

(d) *Circulus Inextricabilis.* It is possible to create some apparently insoluble situations under the 1925 system similar to that discussed above in connection with the rule in *Dearle* v. *Hall.*[52]

We saw [53] that if there is a registrable mortgage to A, followed by a registrable mortgage to B, and then A registers, B has priority over A. If a third mortgage is then made to C, C will have priority over B. But A, having registered, has priority over C. Thus, B is before A, C before B and A before C.

Such a problem, as indicated above, would probably be solved by the application of the doctrine of subrogation:

Take the first mortgage in point of time; that to A. B takes before A; so let B take. But C is before B. As B is taking his money, C immediately steps into B's shoes, and takes it instead. Thus C is not exercising any priority over A; he is exercising his own priority over B in respect of B's priority over A.

Thus, B's priority over A is satisfied first; although C took the money. B's priority over A is however exhausted, and the competition now is between A and C. A takes before C. That leaves B and C, and C takes before B. Paradoxically, B is given the initial claim against A; but is the last to be paid.

This solution is an arbitrary one, and all depends upon the choice of the mortgage with which to start. We chose the first in time, A. If we had chosen to start with B, C would have been the unlucky one. The doctrine of subrogation does reach a solution, but does not work justice. And the problem would be more complicated and arbitrary if more mortgages were included. There is much to be said for the view that all claims are essentially the same, and that the available money should be shared *pari passu.*[54]

[51] L.C.A. 1925, s. 13 (2).
[52] *Ante*, p. 586.
[53] *Ante*, p. 589.
[54] Cheshire, p. 630; for general discussion see (1961–1962) 71 Yale L.J. 53 (G. Gilmore); (1968) 32 Conv.(N.S.) 325 (W. A. Lee).

iii. Mortgages of Equitable Interests in Land: Application of the Rule in Dearle v. Hall.[55] The rule in *Dearle* v. *Hall*,[55] improved in the ways discussed below, now governs priorities of mortgages of all equitable interests in land in addition to those of pure personalty.[56] Thus, mortgages of all beneficial interests under settlements and trusts for sale are now governed by the same rule; only the tenant for life under a settlement or trustees under a trust for sale being able to effect a mortgage of the legal estate.

(a) *Notice in Writing.* A notice, if it is to affect the priority of competing claimants, must be in writing.[57]

(b) *Persons to whom Notice Should be Given.* As has been seen, difficulties could arise before 1926 because the giving of notice to trustees did not always operate to give full protection to the party giving the notice. Law of Property Act 1925, s. 137 (2), specifies the persons to whom notice should be given:

In the case of equitable interests in settled land (or capital money arising therefrom) to the trustees of the settlement. Where the equitable interest is under a derivative settlement, the notice should be given to the trustees of that settlement.

In the case of equitable interests under a trust for sale, to the trustees for sale.

In any other case, to the estate owner.[58]

(c) *Indorsement of Notice.* It may not be possible to ensure that notice is given to the proper persons. Law of Property Act 1925, s. 137 (4), provides:

> " Where, as respects any dealing with an equitable interest in real or personal property—
>
> (*a*) the trustees are not persons to whom a valid notice of the dealing can be given; or
>
> (*b*) there are no trustees to whom a notice can be given; or
>
> (*c*) for any other reason a valid notice cannot be served, or cannot be served without unreasonable cost or delay;
>
> a purchaser [59] may at his own cost require that—
>
> (i) a memorandum of the dealing be endorsed, written on or permanently annexed to the instrument creating the trust;
>
> (ii) the instrument be produced to him by the person having the possession or custody thereof to prove that a

[55] (1828) 3 Russ. 1.
[56] L.P.A. 1925, s. 137 (1).
[57] L.P.A. 1925, s. 137 (3).
[58] See also L.P.A. 1925, s. 138, providing for a trust corporation to be nominated for the purpose of receiving notice.
[59] This includes a mortgagee; L.P.A. 1925, s. 205 (1) (xxi).

sufficient memorandum has been placed thereon or annexed thereto.

Such memorandum shall, as respects priorities, operate in like manner as if notice in writing of the dealing has been given to trustees duly qualified to receive the notice at the time when the memorandum is placed on or annexed to the instrument creating the trust."

(d) *Trustee's Duty of Disclosure.* Trustees who have received such notice are obligated to produce such notice to any person interested in the equitable interest, at the latter's expense.[60] To that extent the rule in *Low* v. *Bouverie*[61] has been relaxed; but only to the extent of production of the notice, for by Law of Property Act 1925, s. 137 (9), the trustees' duty in respect of other information, corresponding to the duty of a trustee for sale, applies only to persons entitled to equitable interests therein. A prospective purchaser (or later mortgagee) may only claim to see the notice.

iv. Rationalisation of the Doctrine of Tacking. There is now no special significance in a legal mortgage.

(a) *Tabula in Naufragio Abolished.* A legal mortgagee has now, as such, no priority over an equitable mortgagee. Tacking by a third mortgagee, who buys in the first legal mortgage, is therefore abolished.[62]

(b) *Tacking of Further Advances by a First Mortgagee.* A first mortgagee may acquire priority for further advances made by him to the mortgagor in three cases[63]:

1. If he has made an arrangement to that effect with the later mortgagees.
2. If he had no notice of intervening mortgages when he made his subsequent advance.

This is the old rule, but in practice it now bears more strictly on a mortgagee wishing to tack. For notice is constituted by registration of a registrable charge. But this stringency would make it practically impossible for a mortgagee to advance this money, as in *Hopkinson* v. *Rolt*,[64] expressly to secure a current account or other further advances; for example, a banker-mortgagee would be placed in an intolerable situation if, in the case of an overdraft on a current account, he had always to consult the register before making a further advance.

[60] L.P.A. 1925, s. 137 (8).
[61] [1891] 3 Ch. 82; *ante*, p. 587.
[62] L.P.A. 1925, s. 94 (3).
[63] *Ibid.* s. 94 (1).
[64] (1861) 9 H.L.C. 514.

So it is provided, in this case only, that registration of an intervening charge does not of itself constitute notice of it, unless the intervening charge was registered at the date of the original advance or when the last search was made on behalf of the mortgagee seeking to tack [65]:

> 3. If the mortgagee imposes on himself an obligation to make further advances.

Here the Legislature has taken an entirely new line by repealing *West* v. *Williams*,[66] and allowing the mortgagee undisputed priority for his further advances, whether he has notice of intervening incumbrances or not.

[65] L.P.A. 1925, s. 94 (2).
[66] [1899] 1 Ch. 132.

CHAPTER 30

RESTRICTIVE COVENANTS [1]

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1. BACKGROUND

A. Contractual Obligations

Contractual obligations are enforceable between the parties to the contract, whether the obligation arises from a covenant under seal or from a simple contract supported by consideration. Complications have arisen in many aspects of the law by the rule that only the parties to a contract may obtain benefits from, or be subjected to burdens arising from it. Third parties cannot, generally speaking, sue or be sued.

B. Covenants Touching and Concerning Land

If we leave the question of personal ability to sue and liability to be sued, and look at the matter from the point of view of covenants entered into by persons in their capacity as owners of land, we see that the situation is different. Until 1848 [2] this subject was

[1] P. & N., *passim*; Maudsley & Burn, Chap. 8.
[2] *Tulk* v. *Moxhay* (1848) 2 Ph. 774.

essentially governed by common law principles, and must not be allowed too much space here.[2]

i. Covenants Between Freeholders. At common law, the benefit of a covenant affecting land, entered into between freeholders, would pass on a conveyance of the land, provided that it touched and concerned the land,[3] was intended by the parties to run with the land, was entered into with the owner of the legal estate and provided that the land to be benefited was ascertainable from the terms of the deed,[4] and (before 1926) that the purchaser took the same legal estate as the covenantee.[5] The last requirement was, however, relaxed by the decision in *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board*[6] where the Court of Appeal held that Law of Property Act 1925, s. 78, permitted the benefit of a covenant affecting freehold land to be enforced by persons deriving title under the assignee. The reasoning of the case is open to criticism, but the relaxation of the old rule is an improvement.[7] Between freeholders the burden of covenants affecting land never passed.[8]

ii. Covenants Between Landlord and Tenant. Covenants between landlord and tenant were binding also between their assignees; that is to say, between the landlord for the time being and the tenant for the time being (between whom there was privity of estate), provided that the covenant touched and concerned the land. In this case the burden as well as the benefit would pass.[9]

[3] The classic definition of "touching and concerning" the land is that of Bayley J. in *Congleton Corpn.* v. *Pattison* (1808) 10 East 130 at p. 138: "In order to bind the assignee, the covenant must either affect the land itself during the term, such as those which regard the mode of occupation, or it must be such as *per se*, and not merely from collateral circumstances, affects the value of the land at the end of the term." See also *Spencer's Case* (1583) 5 Co.Rep. 16a; *Horsey Estate Ltd.* v. *Steiger* [1899] 2 Q.B. 79 at p. 89. The same test was applied to freehold covenants in *Rogers* v. *Hosegood* [1900] 2 Ch. 388 at p. 395. L.P.A. 1925, ss. 141, 142, use the phrase "having reference to the subject-matter." Cheshire (at p. 406) suggests as a simple test whether the covenant "affects either the landlord *qua* landlord or the tenant *qua* tenant." The practical application of these tests is uncertain in borderline cases.

[4] But the principle *id certum est quod certum reddi potest* was applied; *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500.

[5] *Westhoughton Urban District Council* v. *Wigan Coal and Iron Co. Ltd.* [1919] 1 Ch. 159. See (1954) 18 Conv.(N.S.) 546 (E. H. Scammell).

[6] [1949] 2 K.B. 500.

[7] M. & W., p. 751. See also L.P.A. 1925, s. 79, dealing with the burden of covenants; (1955) 19 Conv.(N.S.) 261 (W. L. Blease), discussing *Williams* v. *Unit Construction Co.* (*post*, p. 606); see also (1956) 20 Conv.(N.S.) 43 (D. W. Elliott); *Re Royal Victoria Pavilion* (*Ramsgate*) [1961] Ch. 581 at pp. 588–589; *Sefton* (*Earl of*) v. *Tophams Ltd.* [1967] 1 A.C. 50 at p. 72.

[8] *Austerberry* v. *Corporation of Oldham* (1885) 29 Ch.D. 750; *E. & G.C. Ltd.* v. *Bate* (1935) 79 L.J.Newsp. 203; Report of the Committee on Positive Covenants Affecting Land (1965), Cmnd. 2719, para. 7; see also *Halsall* v. *Brizell* [1957] Ch. 169.

[9] *Spencer's Case* (1583) 5 Co.Rep. 16a; *Fleetwood* v. *Hull* (1889) 23 Q.B.D. 35; *White* v. *Southend Hotel Co.* [1897] 1 Ch. 767; L.P.A. 1925, ss. 141, 142.

Thus there was no provision at common law for the burden of covenants affecting land, other than those entered into between landlord and tenant, to continue to affect the land in the hands of someone other than the covenantor. Various devices have developed which escape the rule [10]; but the rule itself is well established.

C. Control of Land

A householder who sells part of his garden to a purchaser may wish to control the way in which the purchaser uses the land—at least in order to prevent certain objectionable activities being carried on on the land. He wants to do this for his own comfort whilst he remains in possession of the land retained, and also in order to maintain the value of the land when he sells. For this purpose he needs to be able to control not only the immediate purchaser, but also later purchasers from him.

Similarly, a property developer who is developing a housing estate needs to be able to control the way in which the plots are used after being purchased, so that the remaining plots will maintain their value. He wants also to ensure that the owners of plots are able to enforce their covenants against, not only the original purchasers, but against purchasers from them also.

It is clear that the law of contract is unable to deal with the matter because of the requirement of privity of contract; the common law rules relating to the benefit of contracts running with the land are also inadequate. The present inquiry is into the contribution of equity to the enforceability of covenants between persons other than the parties to them.

Private control of land by individuals who are entitled to enforce the benefit of a covenant runs side by side with public control of land which is based upon the Town Planning legislation. This is not our present concern, but should always be borne in mind. The establishment of a nation-wide public control of land has not, however, reduced the importance of private control by covenants, indeed "the number of registrations [of restrictive covenants] has been increasing in recent years and . . . in the period of 10 years to the end of 1965 more than 60,000 new sets of restrictive covenants were entered in the Land Charges Register alone. In addition to these, substantial numbers of new sets were noted against registered land." [11]

[10] Report of the Committee on Positive Covenants Affecting Land (1965) Cmnd. 2719, para. 8, shows a number of ways in which positive covenants affecting land can be imposed upon third parties. Some of these methods are based upon common law, some on equity, and some on statute.

[11] Law Commission Report on Restrictive Covenants (1967), No. 11.

2. The Running of the Burden in Equity

A. The Doctrine of Tulk v. Moxhay [12]

In an era of great suburban development such as the Victorian era, it was most important to enable landowners and developers to exercise some control over the future use of their land. In those days, there was no legislative control of land use; and nothing, apart from the law of nuisance, to prevent landowners from using their land as they wished. A landowner could, of course, control the future use of the land by granting long leases rather than by selling, but this was not always desirable. And there were a number of ways in which, by means of conveyancing devices, restrictions could be imposed.[13] Indeed, devices of this sort still have to be resorted to if the landowner wishes to make a positive covenant binding on future occupiers of the land; for, as we shall see, the equitable doctrine under discussion relates to restrictive covenants only.

It was in this context that the leading case of *Tulk* v. *Moxhay* [12] was decided in 1848:

> In 1808 the plaintiff sold a piece of vacant land in Leicester Square to Elms, who covenanted for himself, his heirs and assigns that he (Elms) would "at all times thereafter . . . keep and maintain the piece of ground . . . in an open state, uncovered with any buildings, in neat and ornamental order. . ."
>
> After passing through various hands, the land came to the defendant, the conveyance to him containing no such covenant, but he admitted that he had notice of the covenant in the deed of 1808. The defendant threatened to build on the land, and an injunction restraining him was granted by Lord Langdale M.R., and affirmed by Lord Cottenham L.C. who said [14]: "It is now contended . . . that the vendee . . . might sell the piece of land, and that the purchaser from him may violate [the covenant] without this Court having any power to interfere. If that were so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless. It is said that, the covenant being one which does not run with the land,[15] this Court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with

[12] (1848) 2 Ph. 774.
[13] See the Report of the Committee on Positive Covenants Affecting Land (1965) Cmnd. 2719, para. 8; and L.P.A. 1925, s. 153; *Halsall* v. *Brizell* [1957] Ch. 169; *Morland* v. *Cook* (1868) L.R. 6 Eq. 252; *Austerberry* v. *Corporation of Oldham* (1885) 29 Ch.D. 750 at p. 782; Maudsley and Burn, p. 397.
[14] *Tulk* v. *Moxhay, supra*, at pp. 777–778.
[15] *i.e.*, at law.

> the contract entered into by his vendor, and with notice of which he purchased."

There is little doubt that Lord Cottenham's decision was based upon the principle that it was inequitable that a person should come to the land with notice of a covenant restricting its user, and then use it in a way inconsistent with that covenant.[16] This principle was applied in many subsequent cases.[17] It has also been invoked in connection with attempts to make restrictive covenants run with chattels[18] and in attempts to protect licensees against assignees of licensors.[19] However, such a principle proved too much; it soon became clear that it would have the effect of imposing upon many pieces of land enforceable restrictions where there was no corresponding benefit to be protected.

B. The Necessity for Benefited Land

The end of the nineteenth century saw the development of the doctrine from one based on personal conscience to one in which a restrictive covenant became accepted as a form of equitable interest in the land. The plaintiff cannot succeed unless he has an interest in land intended to be benefited and capable of benefiting from the enforcement of the restrictive covenant.[20]

> In *Formby* v. *Barker*[21] one Formby had sold all the land owned by him in Formby, Lancashire, subject to restrictive covenants, to a company which sold off parts to various purchasers including the defendant who took with notice of the covenant. Formby died, leaving all his property to his widow, to whom letters of administration with the will annexed were

[16] *Contra*, Buckley L.J. in *L.C.C.* v. *Allen* [1914] 3 K.B. 642 at p. 654.
[17] *De Mattos* v. *Gibson* (1859) 4 De G. & J. 276; *Western* v. *Macdermott* (1866) L.R. 2 Ch.App. 72; *Catt* v. *Tourle* (1869) L.R. 4 Ch.App. 654; *Luker* v. *Dennis* (1877) 7 Ch.D. 227; *Clegg* v. *Hands* (1890) 44 Ch.D. 503; *Millbourn* v. *Lyons* [1914] 1 Ch. 34; [1914] 1 Ch. 231; *Lord Strathcona SS. Co. Ltd.* v. *Dominion Coal Co. Ltd.* [1926] A.C. 108.
[18] *De Mattos* v. *Gibson*, *supra*; *Messageries Imperiales Co.* v. *Baines* (1863) 7 L.T. 763; *Strathcona* case, *supra*; *Port Line Ltd.* v. *Ben Line Steamers Ltd.* [1958] 2 Q.B. 146; *post*, p. 623.
[19] *Post*, p. 684.
[20] See *Millbourn* v. *Lyons* [1914] 2 Ch. 231; *Kelly* v. *Barrett* [1924] 2 Ch. 379; *Sefton* (*Earl of*) v. *Tophams Ltd.* [1967] 1 A.C. 50. There are exceptions to this rule; see Housing Act 1957, s. 151; National Trust Act 1937, s. 8; Town and Country Planning Act 1962, s. 37; Green Belt (London and Counties) Act 1938, s. 22; Forestry Act 1947, s. 1; National Park and Access to the Countryside Act 1949, s. 16; Water Act 1945, s. 15; and a number of local authorities have powers under private Acts. Also in respect of schemes of development, see *post*, p. 616; the landlord's reversion on a tenancy, *Hall* v. *Ewin* (1887) 37 Ch.D. 74; and the mortgagee's interest in the land, *Regent Oil Co. Ltd.* v. *J. A. Gregory* (*Hatch End*) *Ltd.* [1966] Ch. 402.
[21] [1903] 2 Ch. 539.

granted. The Court of Appeal laid down that Mrs. Formby could not enforce the covenants because, all the land having been sold, she had no land capable of benefiting.

In *London County Council* v. *Allen*,[22] the plaintiff never had any land capable of benefiting. Allen, a builder, obtained possession from the London County Council of land, provided that he agreed to leave vacant a certain part of the land which the London County Council needed in future for the construction of a street. Allen convenanted "for himself, his heirs and assigns, and other the persons claiming under him, and so far as practicable to bind the land . . . into whosesoever hands [it] may come" that he would not build on that part of the land. The land was eventually conveyed to Mrs. Allen, who built on the land and mortgaged it to Norris. The Court of Appeal held that the covenant was not binding on Mrs. Allen and Norris. Buckley L.J. said[23]: "The doctrine ceases to be applicable when the person seeking to enforce the covenant against the derivative owner has no land to be protected by the negative covenant. The fact of notice is in that case irrelevant." Scrutton J. regretted that he could not see his way to depriving Mrs. Allen of her costs. " . . . whatever may be her equitable rights, I am not at all favourably impressed with her conduct as a good citizen. . ."[24]

C. "Touch and Concern"

As with covenants which run with the land at law, it is necessary that the covenant should not be merely personal, but should "touch and concern the land."[25]

D. Nature of Restrictive Covenants

A restrictive covenant thus acquires the nature of an interest benefiting one piece of land and burdening another. As early as 1882, Jessel M.R. had described the doctrine of *Tulk* v. *Moxhay* as[26] " . . . either an extension in equity of the doctrine of *Spencer's Case*[27] to another line of cases, or else an extension in equity of negative easements . . ."

In other words, the doctrine could be regarded either as one where the binding effect of covenants could be extended to cases

[22] [1914] 3 K.B. 642.
[23] *Ibid.* at p. 655.
[24] *Ibid.* at p. 673.
[25] *Ante*, p. 598, note 3.
[26] *London and South Western Rail Co.* v. *Gomm* (1882) 20 Ch.D. 562 at p. 583.
[27] (1583) 5 Co.Rep. 16a: laying down the circumstances in which, as between landlord and tenant, covenants will run with the tenant's estate on an assignment.

where there was no privity of estate (as required by *Spencer's Case*) [27]; or the concept of negative easements was to be extended in equity to include a burden imposed upon the servient tenement and for the benefit of the dominant tenement, not by grant (as with an easement), but by covenant.

The latter is the better analogy. For restrictive covenants under the doctrine of *Tulk* v. *Moxhay* [28] run, not with the estate in land (as do covenants under the rule in *Spencer's Case*),[27] but, like easements, with the land itself. The terminology of easements is used, and we speak of the land of the covenantee as the dominant tenement, and that of the covenantor as the servient tenement; but the prefix "quasi" is often used to show that the concept is not precisely the same as that of dominant and servient tenements with easements. Restrictive covenants are of course equitable only, as Jessel M.R. says; and, while legal easements will be enforceable against everyone coming to the land, a restrictive covenant, like an equitable easement, will be defeated by a bona fide purchaser of the legal estate for value without notice.[29]

Their nature is well exemplified by a comparison of the cases of *Tichborne* v. *Weir* [30] and *Re Nisbet and Potts' Contract*.[31]

In *Tichborne* v. *Weir* [32] the plaintiff's predecessor in title owned a house which in 1802 she leased to Baxter for eighty-nine years. The lease contained a covenant to repair. Baxter made an equitable mortgage of the house to Giraud, and Giraud entered on the premises in 1836, remaining there until 1876 and paying the rent reserved by the lease to the owner. In 1876 Giraud purported to assign the lease to the defendant, who entered and paid the rent until the end of the lease in 1891. He then delivered up possession to the plaintiff. The question was whether he could be made liable on the covenant to repair, but the Court of Appeal held that he was not liable on the ground that he was not an assignee of the original lease to Baxter. By his entry and payment of rent he was a lessee of the plaintiff; he was not, however, the holder of Baxter's lease, and the covenant to repair ran with that lease and not with the land.

[28] (1848) 2 Ph. 774.

[29] Restrictive covenants are now registrable as land charges Class D (ii): L.C.A. 1925, s. 10 (1); *ante*, p. 25; *post*, p. 605. Some easements may also exist in equity only, and are registrable as a land charge Class D (iii) ("equitable easements"); *post*, Chap. 36.

[30] (1892) 67 L.T. 735.

[31] [1905] 1 Ch. 391; Tiley, p. 22; Holdsworth, *Historical Introduction to the Land Law*, pp. 286–287.

[32] (1892) 67 L.T. 735.

In *Re Nisbet and Potts' Contract*,[33] Nisbet had purchased land in 1901 from persons who had only a "squatter's" title, based upon wrongful occupation in 1878. Restrictive covenants had been imposed on the land in 1867 and 1872; Nisbet knew nothing of these but he would have discovered them if he had examined the true title for a period of forty years back.[34]

The present dispute arose over the contract by Nisbet to sell to Potts, and Potts complained that Nisbet was unable to produce a good title because of the restrictive covenants. Nisbet argued that he was a bona fide purchaser of the legal estate for value without notice, and that the covenants were in any case not binding upon him because his title was dependent upon adverse possession and not upon a transfer from the owner whose estate was burdened by the covenants.

Farwell J. and the Court of Appeal accepted neither of these arguments. Nisbet had constructive notice because the covenants would have appeared on the title if he had searched back for forty years; and the covenants were binding upon him because restrictive covenants do not attach merely to the covenantor's estate, but are an equitable burden on the land.

E. Negativity

The doctrine of *Tulk* v. *Moxhay* applies only to negative or restrictive covenants.[35] The form of the covenant is not the ultimate test; indeed the covenant in *Tulk* v. *Moxhay*[36] itself was positive in form.[37] It is said that they must be negative in nature even if positive in form.[38]

Such a test is not satisfactory for two reasons. First, the boundary between the two is extremely difficult to draw. Most positive covenants can be regarded in some ways as negative undertakings. A covenant to build may be infringed if the covenantor digs a pit. The test is lacking in precision. Secondly, it is difficult to see the reason for such a distinction. The "equity" which attracted Lord Cottenham and his successors is just as compelling in the case of

[33] [1905] 1 Ch. 391; [1906] 1 Ch. 386; Tiley, p. 22.
[34] Title should now be based upon a good root of title at least 30 years old: L.P.A. 1925, s. 44 (1). Legislation reducing this period to 15 years is expected shortly: Law Commission (Interim Report on Root of Title to Freehold Land (1967)); Law of Property Bill 1969.
[35] See the Report of the Committee on Positive Covenants Affecting Land (1965) Cmnd. 2719, recommending that the burden and the benefit of positive covenants should run with the land. Legislation is awaited.
[36] (1848) 2 Ph. 774.
[37] *Clegg* v. *Hands* (1890) 44 Ch.D. 503 at p. 519.
[38] Cheshire, pp. 539–540; P. & N., pp. 55–56.

positive covenants as with negative. Owners of divided buildings and blocks of flats are just as concerned about covenants to maintain a lateral wall or a leak-proof roof as they are about covenants not to commit a nuisance. And a covenant to supply water in a waterless area requires enforcement against third parties, morally and economically, just as much as a covenant not to build.[39] This point was recognised by the Wilberforce Committee on Positive Covenants Affecting Land which recommended that, subject to certain conditions, the burden of positive covenants should run in the same way as restrictive covenants.[40]

The reason why the doctrine applies only to negative or restrictive covenants is that the doctrine is one of equity, and that the only available equitable remedy was the injunction. The test of negativity was therefore whether or not the situation was susceptible to an injunction. Gallant attempts were made in the early days to extend the application of the remedy; and in *Cooke* v. *Chilcott*[41] the court performed a well-intentioned intellectual somersault by giving an injunction to restrain the defendant from failing to supply the plaintiff with water. This sort of development came to an end with *Haywood* v. *Brunswick Permanent Benefit Building Society*[42] in 1881 where the Court of Appeal refused to apply the doctrine to a covenant to repair.

F. Registration

The doctrine of *Tulk* v. *Moxhay* is an equitable doctrine, and the interest of a person entitled to enforce a restrictive covenant is an equitable interest. It is therefore defeated, like all equitable interests, by a bona fide purchaser of a legal estate for value without notice.[43] The Land Charges Act 1925, s. 10 (1), provides for the registration of restrictive covenants made after 1925 (except those between landlord and tenant) as land charges Class D (ii); the Law of Property Act 1925, s. 198, provides that registration constitutes actual notice to all persons connected with the land affected. A land charge Class D

[39] (1943) Yale L.J. 699 (C. E. Clark), reprinted in Clark, *Covenants and Interests Running with the Land*, 2nd ed., 1947, Appendix 1; (1945) Cornell L.Q. 378 (C. E. Clark).

[40] Report of the Committee on Positive Covenants Affecting Land (1965) Cmnd. 2719; Law Commission Report on Restrictive Covenants, No. 11 (1967).

[41] (1876) 3 Ch.D. 694. Until *Jackson* v. *Normanby Brick Co.* [1899] 1 Ch. 438, mandatory injunctions were issued in negative form. For example, an injunction ordering buildings to be pulled down would have been made in the form of an order restraining the defendant from allowing the buildings to remain on the land. The Court of Appeal there decided that the injunction should be made in direct mandatory form. *Ante*, p. 60.

[42] (1881) 8 Q.B.D. 403.

[43] *Pilcher* v. *Rawlins* (1872) L.R. 7 Ch.App. 259; Tiley, p. 29; *Wilkes* v. *Spooner* [1911] 2 K.B. 473; *ante*, pp. 24, 27.

is void against a purchaser of a legal estate for money or money's worth, unless registered before the completion of the purchase.[44]

3. The Running of the Benefit

A. General

The running of the burden of a covenant on the disposition of the covenantor's land is only half the story; and the simpler half. If both pieces of land have been assigned, the assignee of the covenantee who takes the benefited land will only be able to enforce the covenant if, in addition to the burden running with the covenantor's land, the benefit has run with his own.

As we have seen, the benefit of a covenant can run with the covenantee's estate at common law, if it touched and concerned the land, was intended by the parties to run with the land, was entered into for the benefit of the owner of the legal estate, and if the land to be benefited was ascertainable.[45] Before 1926, it was necessary also that the purchaser from the covenantee should take the same estate in the land as the covenantee.[46] It has also been possible to assign the benefit of a covenant as a chose in action since provision was made in the Judicature Act 1873 for the legal assignment of choses in action.[47]

Much of the learning on the running of covenants at common law is ancient and uncertain. It is not possible to be precise in the statement of the necessary conditions. One can say, however, that the covenant will run if those conditions are complied with. When it does run, it runs like all covenants running at law, with the estate and not with the land.[48]

If a plaintiff can bring his action under these legal rules there is no need for him to invoke the aid of equity. But there are situations to which the legal rules do not apply, and equity is free to determine the circumstances in which the benefit of the covenant has passed with an assignment of the benefited land. The equity jurisprudence in this field is essentially a further development of the legal rules; but there are some differences.

The situations in which it is essential to comply with the equitable rules are:

44 L.C.A. 1925, s. 13 (2).
45 *Ante*, p. 598.
46 *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500; *Williams* v. *Unit Construction Co.* (1955), rep. in (1957) 19 Conv.(N.S.) 261 (W. L. Blease); L.P.A. 1925, s. 78.
47 s. 25 (6); now L.P.A. 1925, s. 136.
48 But note the exception which L.P.A. 1925, s. 78, has been held to create. *Ante*, p. 598, and note 46, *supra*.

(i) Where the plaintiff or covenantee was an equitable owner [49];

(ii) (Before 1926) Where the plaintiff did not have the same legal estate as the covenantee [50];

(iii) Where the servient land has been assigned and enforcement against the defendant depends upon the equitable doctrine of *Tulk* v. *Moxhay* [51];

(iv) Where the plaintiff relies upon an express assignment of the benefit of the covenant without compliance with section 136 of the Law of Property Act 1925 [52];

(v) Where the plaintiff relies upon his land being part of a scheme of development.[53]

To deal with these situations it has been established that a plaintiff may show that the benefit of the covenant has passed to him in any one of three ways [54]:

(1) That the benefit of the covenant was expressly annexed to the dominant land by the intention of the original parties;

(2) That the benefit of the covenant was expressly assigned to the plaintiff;

(3) That the land formed part of a scheme of development.

B. Express Annexation

i. Intention to Annex. Whether or not the benefit of a covenant is annexed to the dominant tenement depends upon the intention of the parties as manifested by the language of the deed creating the covenant. The effect of annexation will be that the benefit passes automatically with an assignment of the benefited land. It is necessary to look at the language of the deed to see if such an intention is manifested. Further, before the benefit of a covenant can be annexed, the land to which it is to be annexed must be sufficiently described in the deed.

[49] *Fairclough* v. *Marshall* (1878) 4 Ex.D. 37; *Rogers* v. *Hosegood* [1900] 2 Ch. 388.

[50] *Taite* v. *Gosling* (1879) 11 Ch.D. 273; see also *Westhoughton Urban District Council* v. *Wigan Coal and Iron Co. Ltd.* [1919] 1 Ch. 159; *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500; *ante*, p. 598.

[51] *Renals* v. *Cowlishaw* (1878) 9 Ch.D. 125; *Re Union of London and Smith's Bank Ltd.'s Conveyance, Miles* v. *Easter* [1933] Ch. 611, *per* Romer J. at p. 630.

[52] *Re Union of London and Smith's Bank Ltd.'s Conveyance, supra*; *Newton Abbot Co-operative Society Ltd.* v. *Williamson and Treadgold Ltd.* [1952] Ch. 286; *post*, p. 611.

[53] *Osborne* v. *Bradley* [1903] 2 Ch. 446; *Elliston* v. *Reacher* [1908] 2 Ch. 374; *Reid* v. *Bickerstaff* [1909] 2 Ch. 305; *Torbay Hotel Ltd.* v. *Jenkins* [1927] 2 Ch. 225; *Lawrence* v. *South County Freeholds Ltd.* [1939] Ch. 656; *Re Pinewood Estate, Farnborough* [1958] Ch. 280; *Baxter* v. *Four Oaks Properties Ltd.* [1965] Ch. 816; *Re Wembley Park Co. Ltd.'s Transfer* [1968] Ch. 491; *post*, p. 616.

[54] In *Re Pinewood Estate Ltd.* [1958] Ch. 280, Wynn-Parry J. said that these were the only three ways.

The principle was established in the leading cases of *Rogers* v. *Hosegood* [55] and *Renals* v. *Cowlishaw*.[56]

> In *Rogers* v. *Hosegood*, the mortgagors of land sold it and took restrictive covenants in the following form: "with intent that the covenants might so far as possible bind the premises thereby conveyed and every part thereof and might enure to the benefit of [the vendors] . . . their heirs and assigns and others claiming under them to all or any of their lands adjoining or near to the said premises . . ." Later, purchasers from the mortgagors, knowing nothing of the covenant at the time of their purchase, claimed that the benefit of it had passed to them so that they could enforce it against purchasers of the servient land, who took with notice. The Court of Appeal, affirming Farwell J., held that they could. The authorities, they said, "establish the proposition that, when the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land, and may be said to run with it, in contemplation as well of equity as of law, without proof of special bargain or representation on the assignment." [57]

The difference between the requirement for the running of such a covenant at law and in equity is in the qualifications for annexation. At law, it will be treated as annexed if the intention of the parties is that the benefit shall run with the land.[58] In equity it is necessary to show an intention to annex the benefit to the land.

> Thus, in *Renals* v. *Cowlishaw*,[59] a covenant by a purchaser "for himself, his heirs, executors and administrators" with the vendors "their heirs, executors, administrators and assigns" was held not sufficient to annex the benefit to the land.

Common methods of annexation at the present day are either to provide that the covenant is made "with so-and-so, owners for the time being or whatever the land may be. Another method is to state by means of an appropriate declaration that the covenant is taken 'for the benefit of' whatever the land may be." [60]

One further point should however be mentioned. What is the effect upon this requirement of annexation of section 78 (1) of the Law of Property Act 1925? The subsection reads:

55 [1900] 2 Ch. 388.
56 (1878) 9 Ch.D. 125.
57 At p. 407.
58 *Ante*, p. 598.
59 (1878) 9 Ch.D. 125.
60 *Drake* v. *Gray* [1936] Ch. 451 at p. 466 *per* Greene L.J.; (1968) 84 L.Q.R. 22 (P. V. Baker).

"A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and shall have effect as if such successors and other persons were expressed.

For the purposes of this subsection in connexion with covenants restrictive of the user of land 'successors in title' shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited."

It is possible to argue that every covenant, being deemed to be made with the persons there stated, shows an intention to benefit every person who may ever become an owner, lessee or occupier of the land, and that that is equivalent to an intention to annex the benefit to the land itself. It is generally thought that the section will not have the effect of annexing every covenant to land.[61] It may well be that this form of words is an example of the different tests of annexation which are applied at law and in equity.

Even if it does not have the effect of annexing every covenant to the covenantee's land, it does appear to enable a mere occupier to take advantage of a restrictive covenant, provided the benefit of the covenant is annexed to the land.[62]

ii. Annexation to the Whole or Parts of the Covenantee's Land

(a) *The Whole not Capable of Benefiting.* Even if the intention to annex is clear, it is not possible to annex the benefit of a covenant to the dominant land unless substantially the whole of that land is capable of benefiting. The court will not effect a severance, and annex the benefit to that part which is capable of benefiting.[63] The problem can be avoided however if the covenant is drafted so as to annex the benefit to the whole or any part or parts of the estate. The benefit will then be annexed to such parts as are capable of benefiting.[64] The court will hear evidence as to the capability of the land to be benefited by the covenant.[65]

(b) *Annexation to Part of the Covenantee's Land.* If the dominant land is all capable of benefiting and the benefit is annexed to the whole, the purchaser of a part only of the land will only take the benefit of the covenant by annexation if he can show that the

[61] M. & W., p. 764.
[62] Farrand, *Contract & Conveyance*, p. 388.
[63] *Re Ballard's Conveyance* [1937] Ch. 473; (1941) 57 L.Q.R. 203 (G. R. Y. Radcliffe) at p. 210; Elphinstone, *Covenants Affecting Land* (1946), p. 60; *Marten* v. *Flight Refuelling Ltd.* [1962] Ch. 115 at p. 137.
[64] *Marquess of Zetland* v. *Driver* [1939] Ch. 1; (1941) 57 L.Q.R. 203 (G. R. Y. Radcliffe).
[65] *Marten* v. *Flight Refuelling Ltd.* [1962] Ch. 115.

benefit was expressly annexed to the part which he purchased.[66] There has been considerable dispute as to the language which will be sufficient to have this effect.[66]

In *Drake* v. *Gray*[67] certain lands held on trust for sale were being partitioned among the beneficiaries. The trustees retained some of them subject to restrictive covenants entered into with the parties to the deed of partition "and other the owners . . . for the time being of the remaining hereditaments so agreed to be partitioned." On a later sale of part of the partitioned land, the question was whether the benefit of the covenant was annexed to the whole of the covenantor's land, or to each and every part of it. The Court of Appeal held that it was annexed to each part of the dominant land. There was no express provision to that effect, but "the intention, as gathered from the documents and the recital of the whole history of the case, is clear that the benefit of the covenant was to enure to the owner of any part of the remaining hereditaments."[68]

In *Re Selwyn's Conveyance*,[69] Goff J. reached a similar conclusion when the covenant was to "enure for the protection of the adjoining or neighbouring land part of, or lately part of, the Selwyn Estate." It was not possible to annex the benefit to land which had already been sold,[70] but the reference to parts of the estate was sufficient to "colour" the construction of the first part of the covenant.

"Every case of this kind, being one of construction, must be determined on the facts and the actual language used . . ."[71] and a different conclusion was reached in *Russell* v. *Archdale*,[72] where the covenant was "to benefit and protect the vendor's adjoining and neighbouring land"; also in *Re Jeff's Transfer* (*No.* 2)[73] where the purchaser had covenanted with the vendor "for the benefit of the remainder of the Chorley Wood Estate . . . belonging to the vendor." The purchaser of part only of the dominant land could not claim the benefit. In *Stilwell* v. *Blackman*[74] it was conceded that a covenant

66 *Re Union of London and Smith's Bank Ltd.'s Conveyance, Miles* v. *Easter* [1933] Ch. 611; *Reid* v. *Bickerstaff* [1909] 2 Ch. 305; *Drake* v. *Gray* [1936] Ch. 451; *Russell* v. *Archdale* [1964] Ch. 38; (1962) 78 L.Q.R. 334 (R. E. M.); *Re Jeff's Transfer* (*No.* 2) [1966] 1 W.L.R. 841; *Re Selwyn's Conveyance* [1967] Ch. 674; *Stilwell* v. *Blackman* [1968] A.C. 508; (1968) 84 L.Q.R. 22 (P. V. Baker).

67 [1936] Ch. 451.

68 *Ibid.* at p. 461.

69 [1967] Ch. 674.

70 Except by using L.P.A. 1925, s. 56. *Post*, p. 617.

71 See Buckley J. in *Russell* v. *Archdale* [1964] Ch. 38 at p. 47.

72 [1964] Ch. 38.

73 [1966] 1 W.L.R. 841.

74 [1968] A.C. 508.

" to benefit and protect the adjoining property of the vendor " annexed the benefit of the covenant to the whole.

These cases leave open a further question. Suppose that the benefit of a covenant was annexed to the whole (but not to each part) of the dominant tenement, and the whole of that tenement was purchased. The purchaser could enforce the covenant under the general rule. Does he lose this right if he sells part of it? There would be no problem if he were the original covenantee, provided he retained land capable of benefiting. But when a purchaser buys the whole dominant land and sells part, the argument which says that the purchaser of the part sold cannot claim that the benefit is annexed to his part seems to require also a conclusion that it is not annexed either to the part retained. It was not necessary to reach a decision on the question in *Stilwell* v. *Blackman*[75] because the plaintiff's right of enforcement there depended upon express assignment and not upon annexation. Similarly, if the covenant is annexed to the whole of the dominant land, a purchaser of part may enforce the covenant if it is expressly assigned to him.[76] But a rule that the purchaser of the whole of the dominant land, who relies upon annexation for his right to enforce, loses the right if he sells part of the dominant land would have some strange results. The owner of the dominant land would be astonished to be told that he would lose his right to enforce the covenant if he sold, for example, and perhaps compulsorily, a small strip of land for road widening.

C. Express Assignment

As previously explained, the benefit of a covenant may be assigned at law, provided that section 136 of the Law of Property Act 1925 is complied with. " Where the defendant is liable at law (as the original covenantor or his personal representative) there is no difficulty peculiar to the case of covenants affecting land: such an action is governed by the ordinary rules as to the assignment of a chose in action. But where the defendant is sued as an assign of the land burdened by the covenant, the plaintiff can only establish the defendant's liability in equity under the rule in *Tulk* v. *Moxhay*." [77]

In equity, it has long been clear that the benefit of a restrictive covenant may pass by express assignment[78]; but the detailed rules

[75] [1968] A.C. 508, *post*, p. 615.
[76] *Russell* v. *Archdale* [1964] Ch. 38; *Re Jeff's Transfer* (*No.* 2) [1966] 1 W.L.R. 841; *Stilwell* v. *Blackman* [1968] A.C. 508.
[77] P. & N., p. 30.
[78] *Renals* v. *Cowlishaw* (1878) 9 Ch.D. 125 at p. 130; *Ives* v. *Brown* [1919] 2 Ch. 314; *Lord Northbourne* v. *Johnston and Son* [1922] 2 Ch. 309; *Chambers* v. *Randall* [1923] 1 Ch. 149; *Re Union of London and Smith's Bank Ltd.'s*

were slowly established.[79] In most cases of well-drafted covenants, the benefit will be annexed to the dominant land. In cases where that had not been done, equity was determined not to allow potential plaintiffs to "buy in" the benefit of restrictive covenants and enforce them. The requirements which were laid down in *Re Union of London and Smith's Bank Ltd.'s Conveyance, Miles* v. *Easter*[80] as being essential to an assignment of the benefit of a restrictive covenant were that the covenant must have been taken for the benefit of some (retained) land of the vendor, which must be capable of benefiting from the covenant, which must be ascertainable with reasonable certainty, and the assignment to the plaintiff must take place at the time when he purchased the land.[81] If these conditions are complied with, it is possible for the vendor to assign the benefit of the covenant to a purchaser if the language used was adequate to effect an assignment.

The occasion for an express assignment of the benefit of a covenant sometimes arises because the document creating the covenant was inadequate to annex the benefit. Sometimes, however, the original conveyance intentionally avoided annexation so that the covenantee would be left free, at his choice, to give or to refuse the benefit of the covenant to a purchaser to whom he sold.[82]

In *Newton Abbot Co-operative Society Ltd.* v. *Williamson and Treadgold Ltd.*,[83] Mrs. Mardon, the owner of Devonia, an ironmonger's shop, conveyed premises on the other side of the street to a purchaser who covenanted not to use it as an ironmonger's shop. Mrs. Mardon was described as being "of Devonia," but there was no indication in the conveyance of the land to be benefited.

Mrs. Mardon died and left Devonia to her son Leonard. He leased it to the plaintiffs, assigning the benefit of the covenant. The servient tenement was conveyed to the defendants. The question was whether, on the defendant selling ironmongery goods, the plaintiff could enforce the covenants against them.

Four issues arose, of which one is especially relevant to the equitable doctrine concerning assignments.

Conveyance, Miles v. *Easter* [1933] Ch. 611; *Re Rutherford's Conveyance* [1938] Ch. 396; (1938) 6 C.L.J. 339 (S. J. Bailey); (1952) 68 L.Q.R. 353 (Sir Lancelot Elphinstone).

79 *Newton Abbot Co-operative Society Ltd.* v. *Williamson and Treadgold Ltd.* [1952] Ch. 286.

80 [1933] Ch. 611.

81 *Ibid.*, *per* Romer L.J. at pp. 631–632.

82 *Marquess of Zetland* v. *Driver* [1937] Ch. 651.

83 [1952] Ch. 286.

Upjohn J. held that the covenant was not annexed to the land retained. The covenant, although particularly related to the business carried out on the land, did touch and concern the land.[84] It was not necessary to establish that the executors of Mrs. Mardon had assigned the benefit of the covenant expressly to Leonard. "The benefit of the covenant is capable of passing by operation of law as well as by express assignment and formed part of Mrs. Mardon's personal estate on her death."[85] At the moment of her death, it was therefore owned in equity by Leonard, and there was no need for a further assignment to him.

The crucial question was whether or not the land to be benefited was sufficiently described in the deed creating the covenant. For annexation, the land to be benefited must be particularly described. The same rule could be applied for assignment. Indeed, it is odd that there should be different rules relating to the requirement of description of the land in the deed, different in that they vary with the way in which the covenant may be made to pass in the future.[86] Another possible view is that, for the purposes of assignment, extrinsic evidence to describe the land may be introduced so long as *some* indication of the land to be benefited is contained in the conveyance.[87] In the *Newton Abbot* case, however, there was no indication in the conveyance of the land to be benefited; the mention of Devonia as Mrs. Mardon's address indicated nothing; it was sufficient, however, in Upjohn J.'s view, that the land could be identified by extrinsic evidence alone.

Such a rule imposes the minimum of formalities; but it has serious practical disadvantages. A purchaser of the servient land may, on finding that a restrictive covenant has been imposed, wish to discover whether or not it is still binding on him. As will be seen, he may escape its burden in whole or in part by showing that its enforcement no longer serves any good purpose because, for example, of basic changes in the character of the neighbourhood.[88] Before he can form any view on such matters he must know in respect of which land the plaintiff will claim to enforce the covenant. How does he discover who is the person who may enforce against him; and

[84] Criticised (1952) 68 L.Q.R. 353 (Sir Lancelot Elphinstone).
[85] At p. 291; *Ives* v. *Brown* [1919] 2 Ch. 314; *Lord Northbourne* v. *Johnston and Son* [1922] 2 Ch. 309.
[86] (1952) 68 L.Q.R. 353 at pp. 361–362 (Sir Lancelot Elphinstone).
[87] This was the view taken by P. & N. in earlier editions: see 2nd ed., Excursus to Chap. 2.
[88] *Post*, p. 619. *Chatsworth Estates Ltd.* v. *Fewell* [1931] 1 Ch. 224; L.P.A. 1925, s. 84.

in respect of which land? He can discover this if his deeds indicate what land is to be benefited. If the deeds say nothing, he may be unable to find out. Extrinsic evidence may be very effective among people who know the neighbourhood; who knew, that is, who Mrs. Mardon was and knew that Devonia was an ironmonger's shop. But let a decade or two go by; Mrs. Mardon and Devonia are long forgotten; and there is no way of discovering which was the land to be benefited by a covenant relating to the carrying on of an ironmongery business.

These arguments were pressed upon Wilberforce J. in *Marten* v. *Flight Refuelling Ltd.*[89] A covenant had been given to the trustees of a settlement of which Mrs. Marten was infant tenant in tail. The question was whether Mrs. Marten and/or the trustees were entitled to enforce the covenant. The covenant did not describe the land to be benefited; and the trustees, on assenting to the vesting of the land in Mrs. Marten on her majority, made no mention of the benefit of the covenant. The latter point caused no difficulty, for Mrs. Marten was entitled in equity throughout, and there was no need to make an express assignment to her.[90] The case does not therefore have a direct bearing on express assignment. But Wilberforce J. dealt with the question whether or not the benefited land was described in sufficient detail. He followed the *Newton Abbot* case, claiming that, in holding that the covenant was taken for the benefit of the land in question: "I do not . . . go outside such surrounding or attendant circumstances as, in accordance with the authorities, it is legitimate for the court to take into account."[91] As to the objection raised, above he said[92]:

> "It was said that unless the identity of the land to be benefited was clearly stated in, or directly ascertainable from, the conveyance, a purchaser would be placed in an impossible position: he would never know by whom the covenant could be enforced, or whether it was enforceable at all. I am not impressed by this objection: the original covenantee is ascertainable from the document—and moreover appears on or can be ascertained from the land charges register. In a case where the covenant is sought to be enforced by an assign from him, such assign must always prove his right to sue, whether by virtue of annexation, by devolution, by assignment of the benefit of the

[89] [1962] Ch. 115.

[90] *Ives* v. *Brown* [1919] 2 Ch. 314; *Lord Northbourne* v. *Johnston and Son* [1922] 2 Ch. 309; *Newton Abbot Co-operative Society Ltd.* v. *Williamson and Treadgold Ltd.* [1952] Ch. 286; *ante*, p. 613.

[91] At p. 134.

[92] At p. 135.

covenant. The plaintiff may also (as in *Tulk* v. *Moxhay*) have to show that he retains property for whose benefit the covenant was imposed. These are matters which arise in all cases where restrictive covenants are sought to be enforced otherwise than as between the original parties, and I see no greater difficulty in dealing with them in cases such as the present."

One may say in response to this that the purchaser of the burdened land needs to know before the plaintiff appears, indeed before he takes a decision whether or not to break the covenant, or perhaps to purchase the property, who is the person who will claim to enforce it, and which is the land claimed to be benefited by it. A search at the Land Registry may not help. Land charges are registered against the name of the estate owner whose estate is intended to be affected,[93] *i.e.*, the covenantor. The name of the covenantee will appear in the title deeds (if made after the root of title [94]) but it may not be possible to trace him or otherwise ascertain the identity of the land to be benefited.

Thus it would appear to be much more satisfactory for the purchaser of the burdened land to find some indication in the deeds to show which is the land to be benefited. Many cases where the question arises will be cases of covenants made many years ago and where the purchaser may wish to argue that the covenant is no longer operative. He needs to have some better system of ascertainment of the position than that of breaching the covenant, and waiting to see if he is sued.[95]

This leaves open the question whether a successful express assignment of the benefit of a covenant has the effect of annexing it to the land. There is, of course, no problem, in this situation, of identification of the land, for the land is identified by the conveyance. The authorities indicate that an express assignment does not effect an annexation. *Re Pinewood Estate* [96] assumed that a chain of assignments was necessary and *Stilwell* v. *Blackman* [97] held that a covenant, annexed to the whole of the dominant land, could pass by express

[93] L.C.A. 1925, s. 10 (2). Those before 1926 are not registrable.

[94] *i.e.*, the earliest of the documents used by the vendor to prove his title. A good root of title must be at least 30 years old. The period is expected to be reduced soon to 15 years (Law Commission Interim Report on Root of Title to Freehold Land (1967)). Law of Property Bill 1969.

[95] The Report of the Law Commission on Restrictive Covenants ((1967) No. 11) and the Land Obligations Bill which followed it provided that the land to be benefited should be specified in the instrument creating the obligation (cl. 5).

[96] [1958] Ch. 280; [1957] C.L.J. 146 (H. W. R. Wade); *contra*, *Renals* v. *Cowlishaw* (1878) 9 Ch.D. 125 at p. 130; *Rogers* v. *Hosegood* [1900] 2 Ch. 388 at p. 408; *Reid* v. *Bickerstaff* [1909] 2 Ch. 305 at p. 320.

[97] [1968] A.C. 508; (1968) 84 L.Q.R. 22 (P. V. Baker); *cf. Re Arcade Hotel Pty. Ltd.* [1962] V.R. 274.

assignment; and "if express assignment operates as a mode of annexation, it is necessarily excluded where annexation has already occurred." [98] On the other hand, the law relating to the benefit of covenants would be greatly simplified if the concept of "the chain of assignment" disappeared, and the rule were that an assignment effected annexation. Nor need this mean that benefit passed less readily; for a more liberal construction of covenants in relation to their annexation to parts of the dominant land [99] would mean that the benefit would pass automatically where now it can only pass by express assignments. The cases where it would not pass would be those where the parties so intended. The matter must for the present be regarded as open.

D. Schemes of Development (or Building Schemes) [1]

It is impossible on the written page to give a precise exposition of what is or is not a "scheme of development." Such a decision can only be taken with confidence after studying the maps and history of the area and viewing the ground. It is, however, possible to state the rules which have been laid down in the cases and to explain their effect.

The effect of a determination that covenants have been taken as part of a scheme of development is that the occupiers of all pieces of land within the scheme are liable to be sued by any other occupier, and all of them able to sue. As between the participants in the scheme, the covenants are enforceable by all, and enforceable against all.

The requirements of a scheme of development have been laid down as being [2]:

(i) The plaintiff and defendant must derive their title under a common vendor.

(ii) There must be a clearly proved intention that the purchasers of plots should all be able to enforce and be liable upon the covenants.[3] Such an intention will commonly be shown by proving that, previously to selling the plots, the vendor laid out his estate for sale in lots subject to restrictions which it was intended should be imposed on all the lots, and which are consistent only with some general scheme of development.

98 (1968) 84 L.Q.R. 22 at p. 31.
99 *Ante*, p. 609; (1968) 84 L.Q.R. 22 at p. 32.
1 P. & N., p. 35 *et seq.*
2 *Elliston* v. *Reacher* [1908] 2 Ch. 374 at p. 384.
3 *Baxter* v. *Four Oaks Properties Ltd.* [1965] Ch. 816; *Lawrence* v. *South County Freeholds Ltd.* [1939] Ch. 656 at p. 674.

(iii) The restrictions were intended by the common vendor to be and were for the benefit of all the plots sold.

(iv) The purchasers of the lots must have purchased them from the common vendor on the footing that the restrictions were to enure for the benefit of other lots included in the scheme whether or not they were also to enure for the benefit of the lands retained by the vendor.[4]

(v) The geographical area within which those mutual obligations were intended to operate must be ascertainable.[5]

E. Law of Property Act 1925, s. 56

For the sake of completeness in giving an account of the enforcement of restrictive covenants, something should be said of Law of Property Act 1925, s. 56. The section does not deal with the passing of the benefit of a restrictive covenant. It deals with ways in which the benefit can be given, at the time when the covenant is taken, to a person other than the covenantee. Nor is the section concerned with equitable doctrine.

There was, however, an ancient common law rule that "a grantee or covenantee, though named as such in an indenture under seal expressed to be made *inter partes*, could not take an *immediate* interest as grantee nor the benefit of a covenant as covenantee unless named as a party to the indenture"[6]; this technical rule was abolished in 1844. The current statutory provision is section 56 of the Law of Property Act 1925, which reads:

> "A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument."

Various attempts have been made, especially by Lord Denning M.R., to take advantage of the widely drafted subsection so as to allow a third party to sue upon a contract made for his benefit.[7] These attempts have failed.[8]

[4] The reservation to the vendor of the right to sell land free from the restriction is of little force either for or against the existence of a building scheme. *Re Wembley Park Estate Co. Ltd.'s Transfer* [1968] Ch. 491 at p. 498; *Osborne* v. *Bradley* [1903] 2 Ch. 446 at p. 455; *Elliston* v. *Reacher* [1908] 2 Ch. 665 at p. 672 (C.A.).

[5] *Reid* v. *Bickerstaff* [1909] 2 Ch. 305; *Torbay Hotel Ltd.* v. *Jenkins* [1927] 2 Ch. 225 at p. 241; *Re Wembley Park Estate Co. Ltd.'s Transfer* [1968] Ch. 491.

[6] *Per* Lord Upjohn in *Beswick* v. *Beswick* [1968] A.C. 58 at p. 102; *ante*, p. 55.

[7] *Smith and Snipes Hall Farm Ltd.* v. *River Douglas Catchment Board* [1949] 2 K.B. 500; (dissenting) in *Drive Yourself Hire Co.* v. *Strutt* [1954] 1 Q.B. 250; (dissenting) in *Scrutton's Ltd.* v. *Midland Silicones* [1962] A.C. 446.

[8] *Beswick* v. *Beswick* [1968] A.C. 58; Tiley, p. 82.

It is clear that the section will permit a person to whom a benefit is given in an indenture to sue upon it, even though he was not a party to the instrument. Its application is not confined to covenants which touch and concern the land.[9] In what circumstances, then, will the section apply in cases concerning covenants relating to land? And to what extent is the subsection important in restrictive covenant cases?

To answer the second question first. Assume that the vendor, V, is selling off plots of land in circumstances which do not constitute a scheme of development. He sells plot No. 1 to A, No. 2 to B, and No. 3 to C, in that order. A, B and C each enter into restrictive covenants in identical terms. B breaches the covenant; who can sue B? V can sue if he retains land capable of benefiting; C can sue if the benefit of the covenant was annexed to the plot which he bought, or if the benefit of the covenant was expressly assigned to him at the time of his purchase. But A cannot; he purchased before B's covenant could be annexed to his plot; or before it was possible for B's covenant to be expressly assigned to him.

A can be protected, however, by arranging for B and C to enter into restrictive covenants with V, "and also as a separate covenant with his assigns, owners for the time being of land adjoining or adjacent to the said land hereby conveyed. . . ."[10] The benefit is thus given to A as an owner of adjoining land; and there is no need for A to be a party to the conveyance in order to enable him to enforce the covenants.

The question then arises as to the circumstances in which A can take the benefit of the covenant. The example given is a simple case; but Simonds J., in a dictum which has often been approved, said that "It is intended to confer a benefit only on those persons to whom the deed purports to grant an estate or interest or those persons with whom there purports to be a covenant or agreement."[11] Such a test appears, however, to introduce an additional and unnecessary formality, in that the requirement that the covenant should "purport" to be with the third party appears to concentrate upon the form of the covenant and not on its substance. The test which now seems to be followed is that of Sir Wilfrid Greene M.R., who said: "Whatever else section 56 may mean, it is, I think, confined to cases where the person seeking to take advantage of it is a person within the benefit

[9] *Re Ecclesiastical Commissioners for England's Conveyance* [1936] Ch. 430.
[10] *Ibid.*
[11] *White* v. *Bijou Mansions* [1937] Ch. 610 at p. 624; approved by Wynn-Parry J. in *Re Miller's Agreement* [1947] Ch. 615; see also Lord Upjohn in *Beswick* v. *Beswick* [1968] A.C. 58 at p. 106; Tiley, p. 86; Crossman J. in *Re Foster* [1938] 3 All E.R. 357 at p. 365.

of the covenant in question, if I may use that phrase. The mere fact that somebody comes along and says: 'It would be useful to me if I could enforce that covenant' does not make him a person entitled to enforce it under section 56. Before he can enforce it he must be a person who falls within the scope and benefit of the covenant according to the true construction of the document in question." [12]

It will be seen that such a test excludes the possibility of giving the benefit to unascertainable persons such as persons who may in the future be purchasers of a plot of land. Thus, in the example given above, it would not have been possible to give to C the benefit of B's covenant (with V), for C was at the time unascertainable. Nor is it necessary to use section 56 for that purpose; the rules of express annexation and express assignment are available to meet his needs. Where section 56 applies, and where it is needed, is in respect of the giving of the benefit to A. Once section 56 has effectively been used to give the benefit to A, that benefit can be given in such a way, dependent on the words used, to annex the benefit to A's land.[13] Subsequent purchasers from A will then be able to enjoy the benefit of the covenant. They could not, however, have themselves been made direct beneficiaries by the use of section 56.

4. Modification and Discharge of Restrictive Covenants: Declaration and Construction

A. Law of Property Act 1925, s. 84 (1) (2)

We have seen that it is contrary to policy to permit a burden to be imposed on land unless there is a benefit enjoyed in respect of other land.[14] It may be that these conditions both existed at the time when a valid covenant was created; but that changes in the character of the neighbourhood have made the continued existence of the burden inappropriate.

The court will decline to enforce such restrictive covenants if the character of the neighbourhood undergoes such a radical change that their whole *raison d'être* disappears.[15] "But to succeed on that ground the defendant must show that there has been so complete a change in the character of the neighbourhood that there is no longer any value left in the covenants at all." [16]

[12] In *White* v. *Bijou Mansions* [1938] Ch. 351 at p. 365; *Stromdale and Ball Ltd.* v. *Burden* [1952] Ch. 223.
[13] *Re Ecclesiastical Commissioners for England's Conveyance* [1936] Ch. 430.
[14] *Ante*, p. 601.
[15] *Osborne* v. *Bradley* [1903] 2 Ch. 446; *Chatsworth Estates Ltd.* v. *Fewell* [1931] 1 Ch. 224.
[16] *Per* Farwell J. in *Chatsworth Estates Ltd.* v. *Fewell* [1931] 1 Ch. 224 at pp. 229–231.

A similar jurisdiction exists under section 84 of the Law of Property Act. Under subsection (1) any person interested in any freehold or certain leasehold land [17] affected by any restriction may apply to the Lands Tribunal [18] to have the restrictions modified or discharged in whole or in part and with or without payment of compensation. The Tribunal may make such an order on being satisfied of certain conditions relating to changes in the character of the neighbourhood or to the fact that the restriction impedes reasonable user without conferring a corresponding benefit, or that the persons entitled to the benefit would not be injured by discharge or modification, or that they have, by their acts or omissions, consented expressly or impliedly to the restrictions being modified or discharged.[19]

Any order made by the Lands Tribunal may be subject to appeal to the court,[20] and the trend of decisions suggests that they will be slow to regard a covenant as obsolete. "If a case is to be made out under this section, there must be some proper evidence that the restriction is no longer necessary for any reasonable purpose of the person who is enjoying the benefit of it, or that by reason of a change in the character of the property or the neighbourhood, the restriction is one which is no longer to be enforceable or has become of no value." [21] The provisions of the section must be strictly followed. The court is not being "asked to act as a kind of planning authority." [22]

B. Application to Leaseholds

Section 84 (12), as amended, provides that the section applies where a term of not more than 40 years is created in land and 25 years of the term has run.[23] This raises the question whether the section applies only to leaseholders who find themselves bound by

17 For leaseholders, see subs. (12); *infra*.

18 Lands Tribunal Act 1949, s. 1 (4).

19 The county court is given powers by the Housing Act 1957, s. 165, to vary in certain circumstances the terms of a covenant so as to permit houses which cannot be let as a single tenement to be converted into separate tenements: *Josephine Trust Ltd.* v. *Champagne* [1963] 2 Q.B. 160. See also Town and Country Planning Act 1962, s. 81.

20 subs. (5).

21 See Farwell J. in *Re Henderson's Conveyance* [1940] Ch. 835 at p. 846; *Re Truman, Hanbury, Buxton & Co.'s Application* [1956] 1 Q.B. 261; *Driscoll* v. *Church Commrs.* [1957] 1 Q.B. 330; *Re Freeman-Thomas Indenture* [1957] 1 W.L.R. 560, where covenants were declared obsolete, for lack of anyone left to enforce them; *Re Ghey and Galton's Application* [1957] 2 Q.B. 650; *Ridley* v. *Taylor* [1965] 1 W.L.R. 611.

22 *Per* Lord Evershed M.R. in *Re Ghey and Galton's Application* [1957] 2 Q.B. 650 at p. 662.

23 The original figures were 70 and 50 respectively; and amended to 40 and 25 by the Landlord and Tenant Act 1954, s. 52.

Tulk v. *Moxhay* covenants,[24] and whether it applies also to restrictive covenants between landlord and tenant. Harman L.J. in *Ridley* v. *Taylor* [25] said that it applied to the latter as well.

C. Effect of Modification

The next question is whether it can be used to modify covenants, not only between assigns of the original contracting parties, but also between the parties to the covenant. To exclude the latter case would "produce an extraordinary result in a case where the restriction was modified in favour of an assign if the covenantee could still sue the original covenantor in damages on his contractual liability although he had parted with all interest in the property. I cannot but think that the covenant must, where an order is made, be treated in all respects as modified or discharged." [25] However, as Harman L.J. added: "It seems to me that the court should be slow to relieve an applicant of covenants which he himself has entered into." [25]

D. Declaration

Section 84 (2) gives power to the court, on the application of any person interested, to declare whether any land to which the section applies is affected by a covenant and to declare the nature and extent of the covenant and its true construction.[26]

E. Laches

The right to insist on a restrictive covenant may, like any other equitable right, be lost through laches [27] on the part of the person entitled to it.[28] As to what constitutes laches, no hard and fast rule can be laid down, but it can be confidently stated that it must be constituted by such a continued course of inaction as to amount to something like complacency; it would be intolerable that a man should lose the benefit of a covenant by failing to take notice of every trivial breach; for equity to lay down any such broad principle would be to encourage litigation, and to foster a most unneighbourly state of feeling.[29]

[24] *i.e.*, a restrictive covenant which is a burden on the land and therefore binding on their landlord and on themselves. For problems relating to the way in which a tenant obtains information about such a covenant, see L.P.A. 1925, s. 44 (5); *Shears* v. *Wells* [1936] 1 All E.R. 832; (1940) 56 L.Q.R. 361 (D. W. Logan); [1956] C.L.J. 230–234 (H. W. R. Wade).

[25] [1965] 1 W.L.R. 611 at p. 618; *Cresswell* v. *Proctor* [1968] 1 W.L.R. 906 (modification refused of covenant entered into two years earlier).

[26] *Re Sunnyfield* [1932] 1 Ch. 79; *Re Jeffkin's Indentures* [1965] 1 W.L.R. 375; *Re Gadd's Land Transfer* [1966] Ch. 56.

[27] *Ante*, p. 413.

[28] See *Elliston* v. *Reacher* [1908] 2 Ch. 374 and 665.

[29] See *per* Farwell J. in *Osborne* v. *Bradley* [1903] 2 Ch. 446 at p. 457.

5. The Report of the Law Commission on Restrictive Covenants

The Law Commission [30] has recommended sweeping changes in the law relating to restrictive covenants. The report should be consulted for the details. It will be sufficient here to give the summary which the Commission itself gave of its proposals: "Briefly stated, these Propositions recommend the creation of a new interest in land called a Land Obligation, which will be available to regulate matters now dealt with by covenants as to user. Land Obligations will be capable of creation in respect of freehold or leasehold interests in land, but will not apply to rights between lessor and lessee in respect of the demised land. They will be imposed on specified land for the benefit of other specified land so that the burden and benefit will run automatically with the land until released, modified, discharged, or, for example, in the case of an obligation affecting a leasehold interest, brought to an end by effluxion of time: and they will be enforceable only by and against the persons currently concerned with the land as owners of interests in it or occupiers of it. They will thus in nature and attributes be more akin to easements than to covenants." [31]

Such reforms are recommended to apply only to obligations entered into after new legislation has come into effect; and will not therefore have any effect upon covenants existing at that time.[32]

The Law Commission also recommended that its proposals should in principle apply also to positive covenants, and that "a common code should be devised from the Wilberforce recommendations and these propositions." [33]

6. Restrictive Covenants and Chattels

Attempts have been made to apply to chattels a doctrine analogous to that of *Tulk* v. *Moxhay*.[34] The principle relied on by Lord Cottenham,[35] that a person who receives property with notice of a covenant affecting it should not be able to act inconsistently with that covenant, would logically apply. Knight-Bruce L.J., in a famous dictum,[36] stated as a general principle: "Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another with knowledge of a previous contract . . . to use and employ the property . . . in a specified manner, the

[30] (1967) Law Com. No. 11, but implementation is postponed; (1968) Law Com. No. 15.
[31] para. 27.
[32] paras. 34, 35.
[33] para. 30.
[34] (1848) 2 Ph. 774.
[35] *Ante*, p. 601.
[36] *De Mattos* v. *Gibson* (1859) 4 De G. & J. 276 at p. 282.

acquirer shall not, to the material damage of the third person, in opposition to the contract, and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller." Just, however, as the broad principle of *Tulk* v. *Moxhay* [34] was restricted, so this principle, though applicable to the purchase of ships subject to charterparty,[37] cannot be said to be of general application.[38] In particular, equity will not intervene to enforce schemes of resale price maintenance in the absence of contractual relationship between the parties.[39]

The solutions reached at the present day are matters of contract and commercial law rather than of equity.[40] Let it here be said that statutory provisions now control attempts to effect the maintenance of the price of goods commercially sold [41]; and also that of sales of chattels subject to contracts of hire or options to purchase.[42]

[37] *De Mattos* v. *Gibson*, *supra*; *Messageries Imperiales Co.* v. *Baines* (1863) 7 L.T. 763; *Lord Strathcona SS. Co.* v. *Dominion Coal Co.* [1926] A.C. 108.
[38] *Port Line* v. *Ben Line Steamers* [1958] 2 Q.B. 146.
[39] *Taddy and Co.* v. *Sterious and Co.* [1904] 1 Ch. 354; *McGruther and Co.* v. *Pitcher* [1904] 2 Ch. 306; see also Restrictive Trade Practices Act 1956, s. 25; Resale Prices Act 1964.
[40] Treitel, *Law of Contract* (2nd ed.), pp. 451–472; Cheshire & Fifoot, *Law of Contract* (7th ed.), pp. 416–423.
[41] Restrictive Trade Practices Act 1956, s. 25; Resale Prices Act 1964; Monopolies and Mergers Act 1965.
[42] Hire-Purchase Act 1964, Part III; Hire-Purchase Act 1965.

PART VII

MISCELLANEOUS EQUITABLE RIGHTS AND INTERESTS

CHAPTER 31

PRIVITY OF CONTRACT

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1. NO JUS QUAESITUM TERTIO IN ENGLISH LAW OF CONTRACT

IT has long been established that contractual obligations operate only between the parties to a contract. A contract between A and B may not therefore impose burdens which are binding on C; nor may it confer benefits which are legally enforceable by C. C is not a party to the contract; he is not privy to it. There are however exceptional cases. The problem of the imposition of burdens upon third parties has been discussed.[1] The question for discussion here is whether a benefit may be given to a third party.

The leading case denying the right of a third party to sue upon a contract is *Dunlop* v. *Selfridge*.[2] A contract between a wholesaler and a retailer controlled the resale price of tyres manufactured by the plaintiffs, and provided for a penalty to be paid to the plaintiffs for breach. The House of Lords held that the contract could not be enforced by the plaintiffs. "... Certain principles," said Lord Haldane, "are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* by way of contract." [3]

Such a rule creates a number of avoidable difficulties and complications in contract and commercial law. For example: A covenants with trustees to settle property for the benefit of third parties [4]; B enters into a contract of insurance for the benefit of other persons [5]; C pays money into a pension fund so that his wife and children can

[1] *Ante*, p. 600 *et seq.*
[2] [1915] A.C. 847.
[3] *Ibid.* at p. 853.
[4] *Ante*, p. 140 *et seq.*
[5] *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* [1933] A.C. 70.

benefit after his death [6]; D deposits money in a bank intending to benefit himself and a third party; E contracts in such a way as to limit the liability of himself and his servants (third parties) [7]; F, engaged in international commerce, sells goods under a common procedure under which payments to the seller are to be made by the buyer's banker (third party) who will give credit to the buyer on receipt of the shipping documents; F is not a party to a contract with the buyer's bank.[8] In all these situations, the rule requiring privity puts an obstacle in the way of the third party who wishes to take advantage of the benefit given to him by the terms of the contract.

There is no necessity for such a rule. It is largely excluded in civil law systems,[9] and in the various jurisdictions in the United States.[10] Two years before the Court of Queen's Bench decided in favour of the privity rule in England,[11] the New York Court of Appeals decided against it by holding in *Lawrence* v. *Fox* [12] that an action lies on a promise made with valuable consideration between two parties for the benefit of the plaintiff. The Law Revision Committee [13] recommended in 1937 that a third party should be able to sue, but that his action should be subject to any defence that would have been available in an action between the contracting parties. Such a rule appears to overcome a complication which may arise and which should not be overlooked; namely that, analytically, the question whether a third person is treated as a party is not the same as the question whether he may sue. Just to declare that he is deemed to be a party may be inadequate [14]; for a party can only sue if consideration has moved from him. It is necessary, in other words, to include in any contractual solution of the privity problem some provisions relating to the requirement of consideration; it seems best to provide that the third party may sue if consideration were given by the other parties [15] to the contract.

6 *Re Schebsman* [1944] Ch. 83.

7 *Adler* v. *Dickson* [1955] 1 Q.B. 158; *Scruttons Ltd.* v. *Midland Silicones Ltd.* [1962] A.C. 446.

8 See *Guaranty Trust Co. of New York* v. *Hannay & Co.* [1918] 2 K.B. 623 at pp. 659–661; *Trans Trust S.P.R.L.* v. *Danubian Trading Co. Ltd.* [1952] 2 Q.B. 297 at p. 304.

9 Buckland & McNair, *Roman Law and Common Law*, 2nd ed., pp. 214–217; Amos & Walton, *Introduction to French Law*, (2nd ed.), p. 175; Lawson, *A Common Lawyer Looks at the Civil Law*, p. 56; Cheshire and Fifoot, *Law of Contract*, 7th ed., p. 405.

10 *Restatement of Contracts*, Chap. 6.

11 *Tweddle* v. *Atkinson* (1861) 1 B. & S. 393; Nathan & Marshall, No. 3.

12 20 N.Y. 268 (1859); *cf. Coulls* v. *Bagot's Executor and Trustee Co.* (1967) 40 A.L.J.R. 471.

13 Sixth Interim Report (1937).

14 (1959) 23 Conv.(N.S.) 179 (J. A. Andrews); *Adler* v. *Dickson* [1955] 1 Q.B. 158.

15 (1960) 23 M.L.R. 373 at p. 382 *et seq.* (M. P. Furmston); *Coulls* v. *Bagot's Executor and Trustee Co.* (1967) 40 A.L.J.R. 471.

2. Circumvention of the Rule of Privity

The inconvenience of the rule has been mitigated in various ways. For the present purpose, it is sufficient to glance only at the methods used at common law and those provided by statute. The part played by equity must then be considered in more detail.

A. Circumvention at Common Law

i. Tripartite Contracts. Common law has occasionally seen its way to identifying, as a party to a contract, a plaintiff who at first sight seems to be a stranger to it. If that plaintiff has furnished consideration, he is able to sue on the contract.[16] But the possibility of such a process of construction is not to be relied on in every case in which to do so would make an agreement more effective. The evidence for such a finding must be substantial.[17]

ii. Agency. It is elementary that where an agent contracts on behalf of his principal, within the scope of his authority, the principal may sue or be sued on the contract although not strictly a party to it.[18] Further, the same result is reached if the agent acts outside the scope of his authority, provided he contracted in the capacity of an agent, and the principal ratified the contract. And, under the doctrine of the undisclosed principal, the principal may sue or be sued upon a contract made by the agent in his own name, so long as the contract was within the scope of an agent's existing authority.[19]

However, the relation of principal and agent must be clearly established. It will not be inferred with a view to circumventing the privity rule. No agency was held to exist in *Scruttons Ltd.* v. *Midland Silicones Ltd.*[20]

> A drum containing chemicals was shipped from America to London. The bills of lading, which incorporated the U.S. Carriage of Goods by Sea Act 1936, limited to $500 (£179[21]) per package the liability of the carrier in the event of damage. The

[16] *Clarke* v. *Earl of Dunraven* [1897] A.C. 59; *Rayfield* v. *Hands* [1960] Ch. 1. In *Coulls* v. *Bagot's Executor and Trustee Co.* (1967) 40 A.L.J.R. 471, the High Court of Australia indicated that consideration supplied by only one of two co-promisees might enable the other to sue; *cf. McEvoy* v. *Belfast Banking Co.* [1935] A.C. 24.

[17] *Scruttons Ltd.* v. *Midland Silicones Ltd.* [1962] A.C. 446 at pp. 466, 476, 496.

[18] Hanbury, *Principles of Agency*, 2nd ed., p. 1.

[19] *Keighley Maxted and Co.* v. *Durrant* [1901] A.C. 240.

[20] [1962] A.C. 446. The House rejected the view of Denning L.J. to the effect that the principle of privity of contract was not absolute at common law; see *Smith* v. *River Douglas Catchment Board* [1949] 2 Q.B. 500 at p. 517; and *Drive Yourself Hire Co.* v. *Strutt* [1954] 2 Q.B. 250 at pp. 272–275.

[21] At the rate of exchange then operating.

defendants were stevedores engaged by the carrier. While lowering the drum from the upper floor of the dock transit shed on to a lorry, they negligently dropped it, causing £593 worth of the contents to be lost. The consignees sued the stevedores for £593 in tort. The stevedores sought to rely on the benefit given to the carriers in the bills of lading, and to pay only £179. The House of Lords, affirming the strict privity rule at common law, held that they must pay the whole £593.

The benefit of an immunity clause can, however, pass from an agent to a principal if the parties clearly intended to contract on that basis.[22] But whether standard form contracts, such as those of shipping companies purporting to make their servants into principals for the purpose of passing to them immunity from passengers' claims in tort, will succeed in their object, is a matter which awaits decision by the courts.

B. Circumvention by Statute

The Legislature has intervened in many of the cases in which the privity rule caused particular difficulties. Examples include:

(i) Road Traffic Act 1960, s. 206 (3), providing that an insurance policy under section 203 of the Act shall cover all persons whom the policy purports to cover.[23] The subsection cuts right across, not only the statutory requirements of the Life Assurance Act 1774 as to insurable interest and the presence in the policy of the name of the assured, but also the rule that a third party cannot enforce a contract made on his behalf by two other parties.[24]

(ii) Married Women's Property Act 1882, s. 11. A policy effected by a man or woman on his or her own life, and expressed to be for the benefit of spouse or children, creates a trust in favour of those intended to be benefited and entitles them to claim the policy moneys.[25]

(iii) Law of Property Act 1925, s. 56:

> "A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry,

22 *The Kirknes* [1957] P. 51 at p. 66.

23 *Tattersall* v. *Drysdale* [1935] 2 K.B. 174; see also Road Traffic Act 1960, s. 208; and Third Parties (Rights Against Insurers) Act 1930.

24 Inconvenience arising from the absence of such a provision is demonstrated by the decision of the Judicial Committee of the Privy Council (on appeal from Canada) in *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* [1933] A.C. 70. The appeal was argued on the footing that a trust relationship existed (*post*, p. 631) but the Judicial Committee found the argument to be wholly unreal.

25 *Post*, p. 631. The principle of this provision might with advantage be extended to other forms of insurance.

> covenant or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument."

The terms of the section are so wide that a few judges [26] regarded it as abrogating the rule in *Dunlop* v. *Selfridge*.[27] But this view has not prevailed; in *Beswick* v. *Beswick* [28] the House of Lords interpreted the provision in a conservative manner, confining it at the very least to interests in existing property.[29]

C. Circumvention in Equity

i. The Trust Concept. A few cases have enabled the third party to obtain the benefits due to him under the contract by finding that one of the contracting parties contracted as trustee for him; recent decisions, for good reasons it will be submitted, have not given much encouragement to the development of this doctrine. But the House of Lords has recently, as has been seen, extended the scope of the remedy of specific performance so as to enable a party to a contract to obtain performance for the benefit of a third party.[30]

(a) *Analysis.* It has been seen that the subject-matter of a trust may, generally speaking, be any form of property recognised by the law.[31] This includes a chose in action; there is no problem in upholding a trust of a chose in action. If a creditor is owed £1,000 by his debtor, he may assign the debt to trustees, or may declare himself trustee of it; a common example of this is a declaration of trust of "money" in a bank, which is a debt owed by the bank to the customer. Further, a trustee may enter into a contract concerning trust property; the contractual rights are then part of the subject-matter of the trust. And as was seen in the previous section, a contract of insurance within the Married Women's Property Act 1882, s. 11, creates a trust of the contract in favour of the members of the family intended to be benefited by the policy of insurance. Whenever, therefore, the promisee, in the case of a contract intended to benefit a third party, is construed as having contracted *as trustee*, he holds the benefit of the promise on trust for the third party. In those circumstances, the third party's rights can be enforced either by means of an action by the trustee who recovers damages on behalf of

[26] *Ante*, p. 617; and see the decision of the Court of Appeal in *Beswick* v. *Beswick* [1966] Ch. 538; Tiley, p. 82.
[27] [1915] A.C. 847.
[28] [1968] A.C. 58; see particularly at p. 105 *per* Lord Upjohn; Tiley, p. 82.
[29] M. & W., p. 747 *et seq.*; Cheshire, p. 544; Maudsley and Burn, p. 439 *et seq.*; *ante*, p. 618.
[30] *Beswick* v. *Beswick*, *supra*; *ante*, p. 55; *post*, p. 635.
[31] *Ante*, p. 86.

the " beneficiary," [32] or by a suit by the " beneficiary " to which the trustee must either join as co-plaintiff or be joined as defendant.[33]

(b) *The Authorities.* Such a jurisdiction goes back in equity as far as the decision of Lord Hardwicke in *Tomlinson* v. *Gill.*[34] In modern times, the leading cases applying the doctrine are *Lloyd's* v. *Harper* [35] and *Les Affréteurs Réunis Société Anonyme* v. *Leopold Walford (London) Ltd.*[36]

In *Lloyd's* v. *Harper*,[35] a father, on his son's admission as an underwriter at Lloyd's, gave a guarantee to the Committee of Lloyd's by which he held himself responsible for his son's liabilities as underwriter. The guarantee made no express mention of creditors but, on the son's bankruptcy, it was held by the Court of Appeal that Lloyd's had accepted the guarantee as trustees for creditors generally. They were therefore able, in an action on the guarantee, to recover in respect of the losses suffered by their " beneficiaries," the creditors.

In *Les Affréteurs Réunis Société Anonyme* v. *Leopold Walford (London) Ltd.*[36] a charterparty provided that the owners of the ship should pay to Walford, a broker who had negotiated the charterparty, a commission in respect of his services. Walford was not a party thereto. The House of Lords upheld Walford's claim on the ground that the charterers had contracted with the owners as trustees for Walford. Walford could enforce the agreement by joining the charterers as co-plaintiffs if they consented; otherwise as defendant.

On the other hand, there are many cases where the opportunity to apply the doctrine has been refused.[37] Its application has been uncertain and " unpredictable." [38] The reasons for this will be explained

[32] *Lloyd's* v. *Harper* (1880) 16 Ch.D. 290.

[33] *Les Affréteurs Réunis Société Anonyme* v. *Leopold Walford (London) Ltd.* [1919] A.C. 801.

[34] (1756) Amb. 330; *Gregory and Parker* v. *Williams* (1817) 3 Mer. 582; *Fletcher* v. *Fletcher* (1844) 4 Hare 67; Nathan & Marshall, No. 4; *ante*, p. 145. The same principle had been applied before the Judicature Act 1875 in the Court of Exchequer: *Lamb* v. *Vice* (1840) 6 M. & W. 467; *Robertson* v. *Wait* (1853) 8 Ex. 299. See generally (1930) 46 L.Q.R. 12 (A. L. Corbin).

[35] (1880) 16 Ch.D. 290.

[36] [1919] A.C. 801; *Re Flavell* (1883) 25 Ch.D. 89; *Re Foster's Policy* [1966] 1 W.L.R. 222; *Harmer* v. *Armstrong* [1934] Ch. 65; *Prudential Staff Union* v. *Hall* [1947] K.B. 685; *Royal Exchange Assurance Co.* v. *Hope* [1928] Ch. 179; *Re Webb* [1941] Ch. 225.

[37] *Re Engelbach's Estate* [1924] 2 Ch. 348; *Re Stapleton-Bretherton* [1941] Ch. 482; *Re Schebsman* [1944] Ch. 83; *Re Miller's Agreement* [1947] Ch. 615; *Green* v. *Russell* [1959] 2 Q.B. 226; *Scruttons Ltd.* v. *Midland Silicones Ltd.* [1962] A.C. 446; *Beswick* v. *Beswick* [1968] A.C. 58; Tiley, p. 82.

[38] (1944) 7 M.L.R. 123 (G. L. Williams).

below.[39] The point here is that the doctrine has proved unacceptable to the courts in the more recent cases.

> In *Re Schebsman*,[40] an employee contracted with a company for the payment of a pension, the terms being that on his retirement certain sums should be paid to him and, on his death, further sums to his wife and child. He died bankrupt. The trustee in bankruptcy argued that the wife and child were not entitled to the payments; that the employee alone could sue under the contract; and that his bankrupt estate could therefore claim all the payments due under the contract.
>
> The Court of Appeal held that there was no trust for the wife and child. However, this did not mean that the bankrupt estate could claim. The terms of the contract provided for payments elsewhere on his death. Even though the wife and child could not enforce the contract,[41] the estate could not demand the money inconsistently with it. The company was in fact ready and willing to honour the undertaking in respect of the family; if they did so, no one could complain.[42]

(c) *Difficulties in the Application of the Trust Theory.* There are two outstanding problems. The first is due to the fact that a trust creates rights of property in the beneficiary. If a party contracts as trustee for a third party, the contractual rights are the subject-matter of a trust. In no circumstances can a trustee of his own volition alter or reduce the trust property. A trustee of contractual rights may not therefore vary or adjust the terms of the contract. But, in most of the cases discussed, the parties would have assumed that they were still free to do so. The parties in *Walford's*[43] case would have supposed that they could adjust the rates; in *Re Schebsman*,[44] the employee would have assumed that he could renegotiate his pension arrangements. But if the rights are the subject-matter of a trust, they are frozen. As du Parcq L.J. said in *Re Schebsman*,[45] "I have little doubt that in the present case both parties (and certainly the debtor) intended to keep alive their common law right to vary consensually the terms of the obligation undertaken by the company, and if circumstances had changed in the debtor's lifetime injustice might have been done by holding that a trust had been created and that

[39] *Infra.*
[40] [1944] Ch. 83; *Green* v. *Russell* [1959] 2 Q.B. 226.
[41] The estate could have enforced for their benefit under the principle of *Beswick* v. *Beswick*, *supra.*
[42] *Re Stapleton-Bretherton*, *supra.*
[43] [1919] A.C. 801.
[44] [1944] Ch. 83.
[45] *Ibid.* at p. 104.

those terms were accordingly unalterable." The trust solution is thus too ruthless. A trust is a property concept; but this is a contractual context.

Secondly, and most important, is the unpredictability of the "trust concept" in this situation. This is inevitable because the basic rule for the creation of a trust is a manifestation of intention to create a trust [46]; but, in the "third party" context, the attempt is to find a trust where it is quite clear that none of the parties had any intention to create one. It may be repeated that there is no difficulty in creating a trust of a chose in action, provided that there is an intention to create one; without such intention, there can be no trust. In many cases discussed in connection with the creation of trusts,[47] there was a clear intention to benefit a third person, but no intention to create a trust. It is not justifiable to purport to establish a new set of rules for the creation of trusts intended to be applicable only to the question of the rights of a third party under a contract.

It is true that trusts of promises were found to exist in several cases in Chancery prior to the Judicature Act.[48] In those days, however, a less strict test was applied to the creation of trusts [49]; the modern cases emphatically deny the theory that a trust may be found to exist wherever a fiction is needed to escape some inconvenient rule of common law. It is submitted therefore that it is not acceptable to say [50] that "the existence of a supposed trust in these cases grow(s) out of the judicial desire to make a promisor keep his promise in favour of the party intended to receive the performance.... It may well be that the expansion of the trust concept to include cases such as these is an instance of the growth of law by fiction." There are better ways of dealing with this problem than by inventing a fiction which disobeys the basic rules for the creation of a trust.

Further, the problem is not solved merely by calling it a "constructive" trust, as Cheshire and Fifoot do,[51] without indicating what the difference is between constructive trusts and express trusts. It has been seen that an essential feature of a constructive trust is that of preventing a person taking for himself an advantage where to do so

[46] *Ante*, p. 123. "The intention to create a trust must be affirmatively proved": Lord Wright in *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* [1933] A.C. 70 at pp. 79, 80. "An intention to provide benefits for someone else, and to pay for them, does not in itself give rise to trusteeship": Romer L.J. in *Green* v. *Russell* [1959] 2 Q.B. 226 at p. 241.

[47] *Jones* v. *Lock* (1865) L.R. 1 Ch.App. 25; *Richards* v. *Delbridge* (1874) L.R. 18 Eq. 11; *ante*, p. 139.

[48] *Ante*, p. 632, note 34.

[49] As explained in the context of covenants to settle: *Fletcher* v. *Fletcher* (1844) 4 Hare 67; *ante*, pp. 145, 148.

[50] (1930) 46 L.Q.R. at pp. 43, 45 (A. L. Corbin).

[51] *Law of Contract* (7th ed.), p. 410 *et seq.*

is inequitable or unconscionable [52]; it is not a means of giving rights to independent third parties where the settlor has failed properly to declare a trust. The simple truth is that the creation of a trust of a chose in action requires an intention to create a trust of a chose in action; and that in the ordinary case of a contract for the benefit of a third party, none of the parties has any intention to create a trust of the promise; nor, usually, any awareness of the possibility of doing so. The trust technique is thus out of place in this context, and it is hardly surprising that it has not functioned satisfactorily.

ii. Specific Performance for the Benefit of a Third Party. New light was thrown upon the matter by the recent decision in *Beswick* v. *Beswick*,[53] where the House of Lords, while accepting the common law rule of privity of contract, granted specific performance, at the suit of one party, of a contract to pay money to a third party. The third party was thus able to benefit from the initiative of the plaintiff in bringing the action; the third party cannot himself bring an action to claim what was promised. In *Beswick* v. *Beswick*,[53] the third party, as has been seen, was in fact the administratrix of the deceased promisee: however, the House of Lords made clear that she sued in that latter capacity and was not enforcing any rights as third party.

The case was discussed in some detail in the chapter on Specific Performance,[54] and it is necessary here only to explain its relevance to the present question.

3. Conclusion

The conclusion therefore is that the common law doctrine of privity of contract is an unfortunate inheritance from the past. It is unnecessary also; for if the Law Lords in 1915 had studied New York law and had announced that the common law does permit third parties to sue on a contract, there would now be over sixty years of constructive development behind us. But it was not to be so. The statutory intervention has been piecemeal; common law has proved inadequate; the "trust concept" is irrelevant; the *Beswick* doctrine is at best only a partial solution in limited circumstances. What is needed is either a reversal of policy by the House of Lords; or, as that seems most unlikely, statutory reform.

[52] Or to prevent unjust enrichment, *ante*, pp. 218, 222.
[53] [1968] A.C. 58; Tiley, p. 82.
[54] *Ante*, p. 55.

CHAPTER 32

ASSIGNMENT OF CHOSES IN ACTION

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1. WHAT IS A CHOSE IN ACTION?

CHANNELL J. in *Torkington* v. *Magee* [1] defined choses in action as comprising " all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession." Subject to exceptions explained below, a chose in action may be bought, sold, given away, settled or left by will, or become the subject of proceedings under Married Women's Property Act 1882, s. 17,[2] like any other interest in property. A common example of a chose in action is a contractual right such as a debt; but the term also includes shares in a company, insurance policies, patents, copyrights, negotiable instruments and equitable rights under a trust or will. Some, it will be seen, are legal choses in action; others equitable. Many of these are subject to special statutory procedures and can be transferred only in accordance with them.[3] The present chapter is concerned with the ways in which choses in action, other than those for which specific rules have been made, may be transferred or assigned.

[1] [1902] 2 K.B. 427 at p. 430.
[2] *Spellman* v. *Spellman* [1961] 1 W.L.R. 921.
[3] Insurance policies (Policies of Assurance Act 1867; Marine Insurance Act 1906); Negotiable Instruments (Bills of Exchange Act 1882); Copyrights (Copyright Act 1956); Patents (Patents Act 1949); Bills of Lading (Bills of Lading Act

2. Assignability

A. Common Law, Equity and Statute

i. Common Law. At common law, choses in action could be released, but they could not be assigned. This was partly due to the fact that they were regarded as strictly personal,[4] and partly to the fear of maintenance[5]; any attempted assignment was viewed as an intrusion by a third party into a dispute between two others. A power of attorney, however, was recognised as a way in which a third party could, in some circumstances, sue[6]; and negotiable instruments were transferable under the law merchant.

ii. Equity. Equity took a less extreme view of the danger of maintenance, and considered each case on its merits. Thus the assignment of a bare right of litigation is bad in equity no less than at law[7]; but there is "no rule of law which prevents the assignment of the fruits of an action."[8] A distinction is drawn between a right of litigation, and a right of property to which litigation is incidental, and this could be assigned in equity.[9] Thus, in *Dawson* v. *G.N.R.*[10] a claim to compensation in respect of an interest in land injuriously affected by the exercise of the company's statutory powers was assignable; it was not a mere claim for damages: "The payment may be regarded as the price payable for the exercise of the powers, and in our judgment was property."[11]

As to the means or machinery by which a chose in action could be assigned, a distinction must be made between the assignment of legal choses and equitable choses. In the case of an equitable chose, that is to say, a right which was actionable only in a court of equity, such as a pecuniary legacy for which no action at law could be brought,[12] equity could make its own rules; having recognised the assignment of the right, equity allowed the assignee to sue in his own name for it.[13] But in the case of equitable assignment of a legal chose,

1855); Shares (Companies Act 1948). See Cheshire and Fifoot, *Law of Contract* (7th ed.), pp. 459–460, where further details are given.

4 *Lampet's Case* (1612) 10 Co.Rep. 46b at p. 48a.

5 (1920) 33 Harv.L.R. 997 at p. 1019 *et seq.* (W. S. Holdsworth); *cf.* (1936) 52 L.Q.R. at 430 (P. H. Winfield); *Fitzroy* v. *Cave* [1905] 2 K.B. 364 at p. 372. See Criminal Law Act 1967, ss. 13, 14.

6 (1920) 33 Harv.L.R. 997 at p. 1019 (W. S. Holdsworth).

7 *Prosser* v. *Edmonds* (1835) 1 Y. & C. 481; *Defries* v. *Milne* [1913] 1 Ch. 98.

8 *Glegg* v. *Bromley* [1912] 3 K.B. 474 at p. 484, *per* Vaughan Williams L.J.

9 *Dickinson* v. *Burrell* (1866) L.R. 1 Eq. 337; *Ellis* v. *Torrington* [1920] 1 K.B. 399.

10 [1905] 1 K.B. 260; *Compania Colombiana de Seguros* v. *Pacific Steam Navigation Co.* [1965] 1 Q.B. 101.

11 [1905] 1 K.B. 260 at p. 271 *per* Stirling L.J.

12 *Ante*, p. 461; *Deeks* v. *Strutt* (1794) 5 T.R. 690; *Braithwaite* v. *Skinner* (1839) 5 M. & W. 313.

13 See *Warmstrey* v. *Tanfield* (1628) 1 Rep.Ch. 29.

it was necessary to establish some machinery which would allow an action for the benefit of the assignee in a court of law, and also restrain the assignor from suing for his own benefit. To do this, equity compelled the assignor to give the use of his name to the assignee, forbidding him also from suing on his own account.[14] Such was the only way of suing upon an assignment of a legal chose in action prior to the Judicature Act 1873.

iii. Statutory Assignment: Judicature Act 1873, s. 25 (6): Law of Property Act 1925, s. 136. The Judicature Act 1873, s. 25 (6), made provision for the assignment of choses in action at law. The sub-section [15] refers expressly to a "legal chose in action," but it seems that it applies also to equitable choses.[16] The provisions of the sub-section are discussed below.[17]

B. Certain Choses Unassignable

Some interests are incapable of assignment, at law or in equity.

i. Public Salaries. Salaries of public offices may not, on grounds of public policy, be assigned. The rule applies also to public service pensions [18]; but not to those granted exclusively for past services [19]; nor does it apply to salaries paid out of local authority funds.[20]

ii. Maintenance. An assignment tainted with maintenance [21] is not permitted. Maintenance is "an officious intermeddling in a suit which in no wise concerns one, by assisting either party with money or otherwise to prosecute or defend it." [22] It is not thought that this rule is affected by the abolition of criminal and civil liability for maintenance by the Criminal Law Act 1967.[23]

iii. Personal Nature of Contractual Rights. It has been seen that one of the reasons for the refusal of the common law to recognise the assignment of contractual rights was the personal nature of those

[14] Early examples are *Perryer* v. *Hallifax* (1677) Rep.t.F. 299; *Row* v. *Dawson* (1749) 1 Ves.Sen. 331; *Heath* v. *Hall* (1812) 4 Taunt. 326.

[15] Now L.P.A. 1925, s. 136 (1), which however substitutes "legal thing in action" for "legal chose in action" without apparently affecting the meaning.

[16] *King* v. *Victoria Insurance Co. Ltd.* [1896] A.C. 250 at pp. 254, 256; *Re Pain* [1919] 1 Ch. 38 at pp. 44–45; Marshall, *Assignment of Choses in Action*, p. 162 *et seq.*

[17] *Post*, p. 643.

[18] *Wells* v. *Foster* (1841) 8 M. & W. 149.

[19] *Willcock* v. *Terrell* (1878) 3 Ex.D. 323.

[20] *Re Mirams* [1891] 1 Q.B. 594.

[21] For a general discussion, see (1919) 35 L.Q.R. 153 (P. H. Winfield).

[22] *The Dictionary of English Law* (ed. Jowitt); see various definitions discussed by Lord Coleridge C.J. in *Bradlaugh* v. *Newdegate* (1883) 11 Q.B.D. 1 at pp. 5–6.

[23] ss. 13, 14. S. 14 (2) provides that the abolition shall not affect the circumstances in which contracts are held to be illegal or contrary to public policy on the ground of maintenance; the same rule probably applies to assignments.

rights. It is obvious that there can be no assignment of contracts of personal service,[24] or of a contract to paint a picture or to write a book,[25] and it is a fundamental principle that a workman can choose his own employer and cannot be bound against his will to take another.[26] Assignment, it has been said, is limited to cases where "it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it."[27] In *Tolhurst* v. *Portland Cement Manufacturers,*[28] a divided House of Lords held that a contractor who had agreed to supply a company for fifty years with chalk from his quarry for its cement works was bound by this contract to supply, on the same terms, another company which had taken over the first company.

On the other hand in *Kemp* v. *Baerselman,*[29] a contractor who had agreed to supply the plaintiff, a cake manufacturer, with all the eggs he should require for a year, was not bound to supply an assignee.

3. Assignment in Equity up to 1875

It has been seen that equity recognised the assignment of choses in action and was able to effect the assignment of equitable choses; and also by the procedure of compelling the assistance of the assignors, the equitable assignment of legal choses. There are differences in the rules relating to legal and equitable choses; but first the requirements common to all equitable assignments must be explained.

A. A Specified Fund for Payment

There must be an assignment of a specified chose in action or of a part thereof. An assignment by A to C of a debt owed to him by B is a typical example. A may effect an assignment by ordering his debtor to pay the assignee "out of moneys due or to become due from you to me."[30] But there is no assignment where the creditor hands to the assignee an order addressed to the debtor saying "Please pay [the assignee] the amount of his account £42 14s. 6d. for goods supplied." This was merely a request to another person to pay the debt.[31]

[24] *Robson and Sharpe* v. *Drummond* (1831) 2 B. & Ad. 303.
[25] *Stevens* v. *Benning* (1855) 6 De G.M. & G. 223; *Hole* v. *Bradbury* (1879) 12 Ch.D. 886; *Griffith* v. *Tower Publishing Co.* [1897] 1 Ch. 21.
[26] *Nokes* v. *Doncaster Amalgamated Collieries* [1940] A.C. 1014; *In the Estate of Skinner* [1958] 1 W.L.R. 1043, *ante*, p. 70 *et seq.*
[27] *Tolhurst* v. *Associated Portland Cement Manufacturers* [1902] 2 K.B. 660 at p. 668 *per* Collins M.R.
[28] [1903] A.C. 414; affirming [1902] 2 K.B. 660, *supra*; see Lord Simon in *Nokes* v. *Doncaster Amalgamated Collieries Ltd.* [1940] A.C. 1014 at p. 1020.
[29] [1906] 2 K.B. 604.
[30] *Brice* v. *Bannister* (1878) 3 Q.B.D. 569.
[31] *Percival* v. *Dunn* (1885) 29 Ch.D. 128.

B. Intention to Assign

An intention to assign must be proved. No particular form is required.[32] Equity looks to the intent rather than to the form. "The language is immaterial if the meaning is plain. All that is necessary is that the debtor . . . be given to understand that the debt has been made over by the creditor to some third person."[33] The matter in each case is one of construction of the words used. The language may indicate an agreement between assignor and assignee, or an intention to give; it may be in the form of an order to the debtor to pay the debt to the assignee,[34] or, in the case of an equitable chose, an instruction to the trustee to hold on trust for the assignee.[35] A mere authorisation to receive money is not an assignment[36]: nor is the signing of a cheque.[37]

> In *Thomas* v. *Harris*,[38] a father, shortly before his death, handed certain life policies to his son with the request that he should erect a tombstone for him and pay for it out of the assurance moneys. It was held that this amounted to an oral equitable assignment of the policies by way of charge for the sums expended by the son on the tombstone.
>
> In *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*[39] merchants agreed with a bank that goods sold by the merchants should be paid for by a remittance from the purchasers direct to the bank. After a sale, the bank informed the purchasers of their right to the money. The purchasers through their own error paid the money elsewhere. The agreement was held to be an equitable assignment of which the purchasers had notice, and they were liable to pay again.

C. Notice to the Debtor

The absence of notice to the debtor does not affect the validity of an equitable assignment. A change of creditors is no hardship to a debtor. It is, however, important that notice should be given to the debtor for various reasons of which the following are the most significant. Notice is effective from the date of its receipt by or on behalf of the debtor.[40]

32 Subject to the provisions of L.P.A. 1925, s. 53 (1) (*c*) requiring writing for the assignment of an equitable interest under a trust: *ante*, p. 119.
33 *Per* Lord Macnaghten in *Brandt's Ltd.* v. *Dunlop* [1905] A.C. 454 at p. 462.
34 *Re Kent and Sussex Sawmills Ltd.* [1947] Ch. 177; *cf. Rodick* v. *Gandell* (1852) 1 De G.M. & G. 763 (instruction to debtors' solicitors insufficient).
35 *Grey* v. *I.R.C.* [1960] A.C. 1; affirming [1958] Ch. 690; *ante*, p. 120.
36 *Re Williams* [1917] 1 Ch. 1 at pp. 6–8.
37 *Re Beaumont* [1902] 1 Ch. 889.
38 [1947] 1 All E.R. 444.
39 [1905] A.C. 454.
40 *Holt* v. *Heatherfield Trust Ltd.* [1942] 2 K.B. 1 at p. 6.

i. To Ensure Payment to the Assignee. Until the debtor receives notice of the assignments, a payment to the original creditor, the assignor, is a discharge of the debt.[41] In such a case the assignee may of course recover from the assignor, but this may involve further litigation, and also loss if the assignor is insolvent.

ii. To Preserve Priority. Under the rule in *Dearle* v. *Hall*,[42] priority among equitable assignees depends upon the order in which notice in writing [43] is given to the debtor or the trustee. Before 1926, informal notice was sufficient, as where a trustee had received the information by reading a newspaper.[44]

iii. To Protect Against New Rights Arising between Debtor and Assignor. It will be seen that the assignee takes subject to equities existing between the debtor and the assignee. He is unaffected by such equities arising after the debtor has received notice.

D. Consideration

Consideration is not essential for the assignment of an equitable [45] or legal [46] chose. This has not always been so in the case of legal choses. For, as has been seen, the equitable assignment of a legal chose involved the joinder of the assignor as co-plaintiff, so that he could enforce the claim at law; and equity would not so compel him in favour of a volunteer.[47] Since 1875, however, a statutory assignment requires no consideration. "Absence of notice does not affect the efficacy of the transaction as between the assignor and assignee." [48] If an assignment complies with Law of Property Act 1925, s. 136, in all details except that of giving notice to the debtor, it can hardly be that notice and consideration become alternative requirements; "it would, indeed, be strange if mere notice of an invalidity could destroy that invalidity." [49] The procedural requirement that the assignee should be before the court is now satisfied by his joinder as co-defendant; so that the assistance which equity gives only to those who have given value is no longer required.[50] Thus an

41 *Stocks* v. *Dobson* (1853) 4 De G.M. & G. 11.
42 (1828) 3 Russ. 1; *ante*, p. 584; *post*, p. 645.
43 L.P.A. 1925, s. 137 (3).
44 *Lloyd* v. *Banks* (1868) L.R. 3 Ch.App. 488.
45 *Re Wale* [1956] 1 W.L.R. 1346; *Letts* v. *I.R.C.* [1957] 1 W.L.R. 201; see also *Re McArdle* [1951] Ch. 669.
46 *Harding* v. *Harding* (1886) 17 Q.B.D. 442 at p. 445; *German* v. *Yates* (1915) 32 T.L.R. 52; *Holt* v. *Heatherfield Trust* [1942] 2 K.B. 1; *Pulley* v. *Public Trustee* [1956] N.Z.L.R. 771.
47 *Holt* v. *Heatherfield Trust*, *supra*, at p. 3.
48 *Ibid.* at p. 4.
49 *Ibid.* at p. 5.
50 *Ibid.* at p. 5; *E. M. Bowden's Patents Syndicate Ltd.* v. *Herbert Smith & Co.* [1904] 2 Ch. 86 at p. 91.

assignment is a transfer of a piece of property, and may be effected voluntarily.[51] But "a voluntary equitable assignment, to be valid, must be in all respects complete and perfect, . . . with no further act on the part of the assignor remaining to be done to perfect the assignee's title." [52] It is not clear whether an assignment of a part of a debt can be valid without consideration.[53] Where, however, it is by way of a charge [54] or where it concerns future property, there can be no more than a contract to assign, and for this, of course, consideration is required.[55] The possible confusion between cases of assignments and cases of contracts to assign is well brought out in *Re McArdle*.[56] The question in each case is one of construction of the language used.

> In *Re McArdle* [56] the testator's residuary estate was held on trust for his widow for life and then in equal shares for his five children of whom Monty McArdle was one. Monty and his wife carried out certain repairs, at her expense, to a property which formed part of the estate. Later, the five children signed a document which stated: "To Marjorie McArdle. . . . In consideration of your carrying out certain alterations and improvements to the property. . . . We the beneficiaries under the will . . . hereby agree that the executors . . . shall repay to you from the . . . estate when . . . distributed the sum of £488 in settlement of the amount spent in such improvements." The testator's widow died; the payment was not made. Mrs. McArdle sued for the money and failed. The document was not on its face an assignment. It was a promise to pay in the future. But it could not be enforced as a contract, because the consideration was past.

E. The Assignee Takes Subject to Equities

The assignee, whether for value or not, takes the chose in action subject to any equities or other rights which existed in favour of the debtor against the assignor at the time of the assignment. The assignee cannot be in any better position than the assignor was. Thus an assignee from a beneficiary will take subject to the paramount lien on the trust property which the trustee has in respect of all costs and expenses properly incurred by him in the execution of his trust.[57]

51 *Re Patrick* [1891] 1 Ch. 82.
52 *Per* Jenkins L.J. in *Re McArdle*, *supra*, at p. 677.
53 See [1959] C.L.J. 99 (J. C. Hall): Such an assignment is not absolute within L.P.A. 1925, s. 136; see *Walter & Sullivan Ltd.* v. *Murphy* [1955] 2 Q.B. 584, *post*, p. 644.
54 *Re Earl of Lucan* (1890) 45 Ch.D. 470.
55 *Antrobus* v. *Smith* (1806) 12 Ves.Jr. 39.
56 [1951] Ch. 669.
57 T.A. 1925, s. 30 (2): and see *per* Lord Selborne in *Stott* v. *Milne* (1884) 25 Ch.D. 710 at p. 715; Nathan & Marshall, No. 110.

And an assignee from a creditor will take subject to a right of rescission of the contract or to a claim for damages for fraud to which the debtor was entitled against the assignor [58]; or subject to a set-off which existed in favour of the debtor.[59]

In *Roxburghe* v. *Cox*,[60] an officer in the army, intending to retire, mortgaged to the plaintiff, as security for a loan, all the moneys which should be realised by the sale of his commission. On his retirement, the army authorities paid the agreed value of his commission to the defendants, who were both the army agents for the regiment and also bankers to the officer who was £647 overdrawn. The plaintiff then gave notice to the defendant, and claimed the moneys paid to them. The Court of Appeal held that the defendant had a right of set-off against the officer in respect of the overdraft, and that the right, existing before the receipt of the plaintiff's notice, was valid against him also.

4. Statutory Assignment

Law of Property Act 1925, s. 136 (1), provides that

> "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action,[61] of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law. . . ."

When the provisions of the subsection have been complied with, the assignee may sue in his own name at law. There is no need for consideration [62]; and no need to join the assignor as a party. The debtor has been informed and must pay the assignee. No formal requirements (apart from writing) are necessary for a notice of assignment,[63] but a notice containing incorrect statements by giving, for example, a wrong date, may be ineffective.[64] The notice takes effect from the time of its receipt by the debtor; an assignment may, however, be valid as an equitable assignment prior to such time.[65]

[58] *Turton* v. *Benson* (1718) 1 P.Wms. 496; *Lawrence* v. *Hayes* [1927] 2 K.B. 111.
[59] *Roxburghe* v. *Cox* (1881) 17 Ch.D. 520; *Biggerstaff* v. *Rowatt's Wharf Ltd.* [1896] 2 Ch. 93.
[60] (1881) 17 Ch.D. 520; see also *Holt* v. *Heatherfield Trust Ltd.* [1942] 2 K.B. 1, *post*, p. 645.
[61] Including equitable, *ante*, p. 638.
[62] *Re Westerton* [1919] 2 Ch. 104.
[63] *Van Lynn Developments Ltd.* v. *Pelias Construction Co. Ltd.* [1969] 1 Q.B. 607.
[64] *W. F. Harrison and Co. Ltd.* v. *Burke* [1956] 1 W.L.R. 419; (1956) 72 L.Q.R. 321.
[65] *Holt* v. *Heatherfield Trust Co.* [1942] 2 K.B. 1.

An assignment may be "absolute" even though it is a mortgage; for the whole interest passes to the mortgagee and the fact that it is subject to a proviso for redemption does not prevent it from being absolute. There was held to be an absolute assignment in *Hughes* v. *Pump House Hotel Co.*[66] where there was an assignment of all rights existing and to accrue in the future, and in *Tancred* v. *Delagoa Bay Rail Co.*[67] where there was a mortgage of a debt with a proviso for redemption and re-assignment, and in *Burlinson* v. *Hall*[68] where the assignment was of a debt on trust that the assignee should pay himself a certain amount thereout and pay the rest to the assignor. In all these cases the debtor was in no doubt as to the party entitled to payment.

On the other hand in *Durham Bros.* v. *Robertson*,[69] the assignment of a book debt was expressed to endure until, and only until, money lent by the assignee to the assignor was repaid. This was held to be a conditional assignment; the assignor was required to be a party as the debtor was left uncertain as to the state of accounts between the assignor and assignee. Similarly, an assignment which entitled the assignee to an undetermined sum out of a particular fund is an assignment by way of charge.[70] Nor does the assignment of even an ascertained part of a debt satisfy the statute[71]; there will be an equitable assignment of the part assigned, but if the assignee sues upon it, he must join the assignor as a party. And it was held in *Re Steel Wing Co.*[72] that though the assignee of a portion of a debt due from a company can present a petition for winding up the company, yet he cannot serve an effective demand for payment in the absence of the person entitled to the remainder of the debt.

5. Scope of Equitable Assignment after the Judicature Act 1873

From what has been said, it will be evident that the Judicature Act 1873, s. 25 (6), and its successor, the Law of Property Act 1925, s. 136 (1), have in no way restricted the operation of equitable assignment. The statutes have made into statutory assignments those which would otherwise have been equitable only. It has not created a new occasion for an assignment where none existed before; it merely improves the machinery of assignment by allowing the assignee to

66 [1902] 2 K.B. 190.
67 (1889) 23 Q.B.D. 239.
68 (1884) 12 Q.B.D. 347.
69 [1898] 1 Q.B. 765.
70 *Jones* v. *Humphreys* [1902] 1 K.B. 10.
71 *Re Steel Wing Co.* [1921] 1 Ch. 349; *Williams* v. *Atlantic Assurance Co.* [1933] 1 K.B. 81; *Walter & Sullivan Ltd.* v. *Murphy & Sons* [1955] 2 Q.B. 584.
72 *Supra.*

sue in his own name. Thus, any assignment which fails to qualify as a statutory assignment may operate in equity according to the same rules which applied prior to and independently of the statutes.

> In *Holt* v. *Heatherfield Trust,*[73] one Partington obtained judgment for a sum of money against a debtor. He assigned the debt to the plaintiff. After the assignment, but before notice of it had been received by the debtor, the defendants obtained an order freezing the assets of the debtor (a garnishee order). Notice of the assignment to the plaintiff was later received by the debtor. The question was whether the plaintiff took free from or subject to the garnishee order. Atkinson J. held that he took free; the assignment[74] was effective in equity before the garnishee order took effect even though it was not effective as a statutory assignment until the notice was received.

6. Priorities

A word should be said upon some difficult and unsettled matters relating to priorities between competing assignees of choses in action. It is not possible, however, to give a clear or convincing picture. The basic rule for the determination of priority between competing assignees of equitable interests is the rule in *Dearle* v. *Hall,*[75] already discussed in Chapter 29 on Mortgages. Priority depends upon the order of giving notice to the trustees; a later assignee, provided he had no actual or constructive notice of an earlier assignment *at the date of his own,* may take priority over an earlier assignee by first giving notice to the trustees.

A. Relationship between the Rule in Dearle v. Hall and the Rule that an Assignee Takes Subject to Equities

It is vital that these two situations be kept distinct. The rule of priority is concerned with the claims of competing third parties against the beneficial interest. The rule that an assignee takes subject to equities means that all assignees (the third parties) take subject to equities existing in favour of the trustees against the owner of the beneficial interest; or in favour of the debtor against the creditor. For example, T holds property on trust for B, and is entitled to a claim, as trustee,

[73] [1942] 2 K.B. 1; *William Brandt's* v. *Dunlop* [1905] A.C. 454 at p. 461. "The statute does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree": *Olsson* v. *Dyson* (1969) 43 A.L.J.R. 77.

[74] Even if voluntary. The question whether a release of a debt was a consideration was not determined: (1943) 59 L.Q.R. 58 (R. E. Megarry); (1943) 59 L.Q.R. 129 (H. A. Hollond); (1943) 59 L.Q.R. 208 (R. E. M.).

[75] (1828) 3 Russ. 1.

for expenses properly incurred. B mortgages his beneficial interest, first to X and then to Y. Y has no notice, at the time of the mortgage to him, of the mortgage to X, and gives notice to T before X does. The competition between X and Y is a question of priorities: under the rule in *Dearle* v. *Hall*,[76] Y has priority. But each of them, and regardless of notice, takes subject to T's claim for expenses; that is an equity subject to which all assignees take.

B. The Interest of the Assignor

It has been seen that the rule in *Dearle* v. *Hall*[76] is made applicable, by Law of Property Act 1925, s. 137, to assignments of equitable interests in land as well as interests in pure personalty. The rule is referred to in s. 137 (1) as "The law applicable to dealings with equitable things in action which regulates the priority of competing interests therein. . . ." It was held in *B. S. Lyle Ltd.* v. *Rosher*[77] that the rule only applied where the assignor owned some interest *beneficially* which he assigned to the competing claimant. In that case the assignor charged in favour of a moneylender a right to income which he held as trustee. The moneylender could not claim priority over the persons entitled under the trust by giving notice to the holders of the fund providing the income. The House was not prepared to extend the application of the rule,[78] although the trusts were declared by a private document of which he had no knowledge or means of knowledge.

C. Equitable Assignment of Legal Choses in Action

It has, however, been held that the rule in *Dearle* v. *Hall*[76] applies to the ascertainment of priority between successive equitable assignees of a legal chose in action.

> In *Marchant* v. *Morton, Down & Co.*[79] a debt due to a firm was first assigned by one partner to the defendants, and subsequently by the other partner to the plaintiff. The plaintiff was the first to give notice to the debtor and took priority over the defendants.

In such a situation, the assignor does not strictly own an equitable interest, or "equitable thing in action." He can, however, be said to be beneficially entitled to the debt. Lord Morton appeared to have this in mind when he said that the rule in *Dearle* v. *Hall*[80] required, among

[76] (1828) 3 Russ. 1.
[77] [1959] 1 W.L.R. 8; (1961) 77 L.Q.R. 69 (Sir Lancelot Elphinstone). For a detailed discussion, see the 8th ed. of this work, pp. 386–388.
[78] *Ward* v. *Duncombe* [1893] A.C. 369 at p. 394; *Hill* v. *Peters* [1918] 2 Ch. 273; *B. S. Lyle Ltd.* v. *Rosher*, *supra*, at pp. 14, 22, 24.
[79] [1901] 2 K.B. 829.
[80] (1828) 3 Russ. 1.

other things, "an individual . . . having a beneficial interest in the debt or fund." [81] It has been doubted whether the rule should be applied to this situation.[82]

D. Trusts Already Created

Law of Property Act 1925, s. 137, applies to dispositions by operation of law, but does not "apply until a trust has been created." [83] It thus applies to dealings with existing equitable interests; and not to the creation of equitable interests out of the legal estate, whether by creation of trusts or equitable mortgages of the legal estate. Competing interests in such situations are dealt with, as has been seen, quite differently.[84] Trusts are overreached by a purchaser; equitable mortgages are protected either by deposit of the title deeds or are registrable.

E. Summary

Sufficient has been said to show that a number of closely related but different doctrines are operating in this field, the limits of their operation not being clearly defined. Nor is it clear what is the best solution to the problem of competing assignees. One possible solution, applied in *B. S. Lyle Ltd.* v. *Rosher,*[85] is that equitable interests take effect according to the time of creation; but such a rule gives rise to a number of difficulties. Indeed, no later assignee could ever claim, for the assignor has no beneficial interest to assign to him if he has assigned to the first assignee; he had no interest in *B. S. Lyle Ltd.* v. *Rosher* [85] because he was a trustee. This means that the holder of an equitable interest or a debt may secretly declare trusts of it, in favour of beneficiaries who are protected against later assignees or mortgagees of the interest. If that were so, a reversionary interest under a family fund would become a hazardous security.[86]

This problem is overcome where the rule in *Dearle* v. *Hall* [87] applies, because it permits a later assignee, having *no notice, at the time of the assignment to him,* of the earlier assignment, to obtain priority by first giving notice. Although this rule is much criticised,[88] it does meet the two essential requirements of a priority rule; it both allows the first assignee to protect himself by a simple procedure of giving notice; and it protects a later assignee from the consequence

[81] *B. S. Lyle Ltd.* v. *Rosher*, *supra*, at p. 16.
[82] [1951] J.S.P.T.L. 480.
[83] L.P.A. 1925, s. 137 (10); (1956) 20 Conv.(N.S.) 444 (F. R. Crane).
[84] *Ante*, p. 573 *et seq.*
[85] [1959] 1 W.L.R. 8.
[86] (1961) 77 L.Q.R. 69 at p. 71 (Sir Lancelot Elphinstone).
[87] (1828) 3 Russ. 1.
[88] See Lord Macnaghten in *Ward* v. *Duncombe* [1893] A.C. 369 at pp. 393–394.

of the first assignee's failure to do so. The same cannot be said of the rule in *B. S. Lyle Ltd.* v. *Rosher.*[89]

The 1925 legislation, as has been seen, aimed to provide, in dealing with priorities relating to mortgages of *legal* estates, a system in which a later mortgagee either discovered [90] the earlier mortgage or he took free of it. If this principle were applied to the problem of priorities of dealings with equitable interests, the rule would be that the later assignee took free of the earlier assignment unless he had notice of it: and notice would be obtained by inquiring of the trustees.

This is near to the rule of *Dearle* v. *Hall,*[91] but is slightly more extreme, for it would give priority to the later mortgagee, regardless of the order of notice. There is, however, much to be said for the view that a single general principle should control priorities of assignments of both legal and equitable interests.

Different views will be held on the question which is the most satisfactory rule; and no specific choice is made here. The rule in *Dearle* v. *Hall* [92] governs priorities of dealings with existing equitable interests. According to *Marchant* v. *Morton, Down & Co.*,[93] it applies to equitable assignments of legal choses. Difficulties will largely be avoided in practice [94] if assignees will inquire of trustees or debtors whether they have information of prior assignments, and will give notice immediately of the assignment to them.

89 [1959] 1 W.L.R. 8.
90 By the absence of the title deeds or by registration.
91 (1828) 3 Russ. 1.
92 (1828) 3 Russ. 1.
93 [1901] 2 K.B. 829.
94 But not entirely; see *Re Dallas* [1904] 2 Ch. 385.

CHAPTER 33

FRAUD, MISREPRESENTATION AND MISTAKE

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1. THE DIFFERING REMEDIES

THE range of legal issues involved in these subjects is enormous and has a considerable literature already.[1] Common law and statute law are involved in them to as great as if not a greater degree than equity, and it is not appropriate to give even a brief account of the whole law relating to these subjects in this book. Instead, an attempt will be made to look at the equitable approach to these subjects and the degree of equitable involvement in them.

The differing character of equitable remedies must first be appreciated. First, it is obvious that factors such as fraud, misrepresentation and mistake are relevant to the exercise of the discretionary jurisdiction to issue injunctions and decrees of specific performance. Here, the question is ordinarily one of the manner in which an already existing legal or equitable right is enforced.[2] The right itself is not affected. Thus if equity refuses to decree specific performance of a contract due to a defendant's mistake, the plaintiff's right to sue for damages still subsists.[3] It is merely that a supplementary method of enforcement is denied to a plaintiff. But secondly, other equitable remedies are larger in their effect; if equity rescinds a deed or a contract, a right to sue on that contract or deed ceases to be available at law. Equity will exercise this jurisdiction on grounds on which law takes no similar action, for instance, in cases of constructive fraud or wholly innocent misrepresentations, so that the equitable remedy

[1] As well as periodical literature, see Kerr on *Fraud and Mistake*; Stoljar, *Mistake and Misrepresentation*; Sheridan, *Fraud in Equity*.
[2] *Ante*, pp. 36, 64.
[3] *Wood* v. *Scarth* (1855) 2 K. & J. 33 (in equity); (1858) 1 F. & F. 293 (at law); *Webster* v. *Cecil* (1861) 30 Beav. 62.

affects the substance of a plaintiff's rights, and not merely the manner of their enforcement. This is also true when the equitable remedy of rectification is called into operation, a remedy by which a term of an obligation, contained in a document, is varied so as to make it accord with the parties' real intentions. Such rectification is retrospective, and affects steps taken by the parties in the meantime.[4] Thirdly, it should be noted that an equitable remedy may fulfil a task intermediate between the situations so far considered, the task of enabling a plaintiff to take full advantage of a right at common law. A plaintiff may, for instance, have a right at common law to rescind a contract for fraud, but may be at common law unable to exercise that right [5] because a precise *restitutio in integrum* is not possible. Equity has a wider discretion to bring about a rescission in such a case by devising a fair, if not a precise, return of the parties to something approaching their original positions.[6]

2. Fraud

A. General

Common law has tended to use the words "deceit" and "fraud" synonymously, and to identify both with the common law action of damages which was held, in *Derry* v. *Peek*,[7] to depend upon an awareness, on the part of the defendant, of the falsity of what he was saying. Equity has always used "fraud" to embrace a much wider variety of activities of which it disapproved, but to such situations its own remedies alone are applicable. Thus, while equity's remedies are always available to supplement the common law in cases in which the common law definition of fraud is satisfied,[8] only equity's remedies (and not common law damages) are available to remedy the wider varieties of fraud recognised by equity alone.

Fraud in equity cannot be defined. There are certain types of case with which it is particularly associated, but it is not to be confined to them, and the notion of fraud is embedded more deeply in equity than even a detailed consideration of them would suggest. It is in fact a part of equity's thinking and techniques, and we have already seen its width and variety of effect in situations such as arise in secret

4 *Malmesbury* v. *Malmesbury* (1862) 31 Beav. 407.
5 And would be confined to an action for damages.
6 *Spence* v. *Crawford* [1939] 3 All E.R. 271; a decision showing that equity may be more willing to do so in cases of actual fraud than in other cases.
7 (1889) 14 App.Cas. 337. The House of Lords in effect refused to allow the common law action for damages to depend upon the extended equitable view of fraud.
8 As in *Spence* v. *Crawford* [1939] 3 All E.R. 271, Tiley, p. 49.

and half-secret trusts and frauds on a power.[9] Its lack of definition is thus no defect.

In section B, instances will be given where equity has granted relief under the head of fraud to cases outside the realm of deceit at law, and these will show the flexibility and form of that relief. Here it may just be noted that there are many instances in which both common law and equity have recognised the need to qualify ordinary commercial morality by requiring absolute candour, for instance, insurance contracts and company prospectuses[10]; but equity has gone a good deal further in determining the range of agreements in which failure to disclose all known relevant facts may lead to rescission; as, for example, with family settlements.

> In *Gordon* v. *Gordon*,[11] a deed of settlement of property within a family was entered into by an eldest son in the belief that he was illegitimate, though a younger son knew of a secret marriage of his parents by virtue of which the eldest son was legitimate. Lord Eldon held that a duty of candour recognised in equity had been breached so that the settlement should be set aside.

B. Undue Influence

Under the head of constructive fraud, equity recognises a wide variety of situations in which intervention is justified by reason of a defendant's influence or dominance over a plaintiff in procuring his execution of a document (such as a settlement) or his entering into an obligation; equity's intervention here is independent of any question of the accuracy of information supplied to the plaintiff. Equity intervenes in such cases, not because, as is the case with misrepresentations, the defendant has positively (albeit innocently) misled the plaintiff on a particular and relevant point of fact, but because the defendant has caused the plaintiff's judgment to be clouded, with the result that the plaintiff has failed to consider the matter as he ought.

Actual threats, or physical duress, are remedied both at law and in equity, but equity's view is the wider. Where threats have made it impossible for a plaintiff either to consider the relevant matter

[9] *Ante*, pp. 161, 109. The judgments of Lord Hardwicke in *Earl of Chesterfield* v. *Janssen* (1751) 2 Ves.Sen. 125 and of Lord Haldane in *Nocton* v. *Lord Ashburton* [1914] A.C. 932; Tiley, p. 45, contain the best general accounts of the width of equitable jurisdiction on the ground of fraud.

[10] See *e.g.*, *London Assurance Co.* v. *Mansel* (1879) 11 Ch.D. 363 and Kindersley V.-C.'s well-known judgment in *The New Brunswick and Canada Railway and Land Company* v. *Muggeridge* (1860) 1 Dr. & Sm. 363 at p. 381.

[11] (1816) 3 Swan. 400. Bargains with expectant heirs was another popular area of protection in earlier centuries.

normally or to feel a free agent, as when a son was threatened with disclosure to his sick father of the forging of the father's signature by his brother, equity will intervene.[12] But influence by means other than threats is the more usual type of case. It is possible for a defendant to have obtained almost complete domination over the mind of another,[13] but in most cases the undue influence is exerted only to secure a specific objective.[14] The varieties of methods are infinite also; they may range from developing a sense of complete confidence [15] over many years to quick seizure of an opportunity presented by a defendant's weakness. In *Tufton* v. *Sperni*,[16] a plaintiff was prevailed upon to buy a house from the defendant at an overvalue and at the same time to make it available to the defendant on a lease at absurdly favourable terms. The Court of Appeal, in rescinding the transaction, emphasised that these cases cannot be categorised, but are all variations on the one theme of undue [17] use of a mental domination possessed or gained over another.

It is possible to divide the cases up into those, first, in which equity readily perceives the possibility of such influence, such as parent and child, guardian and ward, religious adviser and pupil, cases in which equity requires positive evidence that no undue influence was in fact exerted; and, secondly, those in which equity requires positive proof of influence having actually been exerted. But in all cases the question is whether a defendant has taken advantage of his position, or, *per contra*, has been assiduous not to do so. The question can only be answered in each case by a meticulous consideration of the facts. Many cases turn, as is natural, on whether a defendant discouraged independent legal advice or proceeded in such a way as to make it unlikely that the plaintiff would think of taking it.[18] For, as with many of the flexible remedies of equity,[19] a defendant is not placed under an absolute bar by virtue of this equitable obligation, but has to adopt proper steps, in view of the obligation, if he wishes to proceed in certain ways. So a genuine insistence on independent legal advice is a natural means of repudiating a charge of having

12 *Mutual Finance Co.* v. *Wetton* [1937] 2 K.B. 389, following *Williams* v. *Baily* (1866) L.R. 1 H.L. 200. See (1939) 3 M.L.R. 97 (W. H. D. Winder).

13 *Smith* v. *Kay* (1859) 7 H.L.Cas. 750; *Morley* v. *Loughnan* [1893] 1 Ch. 736; Tiley, p. 52.

14 *Lyon* v. *Home* (1868) L.R. 6 Eq. 655.

15 *Tate* v. *Williamson* (1866) L.R. 2 Ch.App. 55.

16 [1952] 2 T.L.R. 516.

17 It may be undue without being for personal gain, as where a parent's influence leads to an improvident settlement by a child that is only of marginal benefit to the parent: *Bullock* v. *Lloyds Bank* [1955] Ch. 317.

18 *Baker* v. *Monk* (1864) 4 De G.J. & S. 388.

19 *e.g.*, *Holder* v. *Holder* [1968] Ch. 353, *ante*, p. 369; *Phipps* v. *Boardman* [1967] 2 A.C. 46, *ante*, p. 375.

exerted undue influence, even in a case where the possibility of influence was strong.[20]

It would be wrong, however, to generalise too far from the flexibility of approach to be seen in these cases of undue influence. They are basically concerned with special relationships existing between particular people and often involve settlements of property. Constructive fraud is not restricted to such cases, but neither is it a doctrine that derogates in any substantial manner from the much more widely applicable principle that lies behind the maxim *caveat emptor*.[21] Its involvement in ordinary commercial contracts is in fact infrequent.

A point can also be made at this stage, though it is not directly related to constructive fraud, that the types of transactions which attracted equity's particular attention in the nineteenth century cannot be made the basis for any generalisation concerning classes of people needing protection in the twentieth century. There is an analogy between the case of bargains with expectant heirs, and cases where a beneficiary under a trust, although past the age of majority, is still subject to parental influence and is persuaded to use his fortune to support the general family finances, or to make a resettlement for fiscal reasons although technically contrary to his own interest.[22] It could be argued that the modern equivalent to the case of oppressive mortgages is to be found in oppressive hire and hire-purchase terms.[23] But no such development by analogy has occurred in those fields or generally in relation to unfair clauses in standard form contracts which are beyond the comprehension of those entering into them. No protection on any general principle is available.[24] Equity does not improve bargains or render them more fair in operation.[25] Protection depends upon getting within an already existing head of equity jurisdiction such as that relating to relief against penalty clauses.[26] The overall result is not satisfactory, as the types of situation in fact protected by equity at the present day derive more from history than from present need. It can be argued with

[20] See *Zamet* v. *Hyman* [1961] 1 W.L.R. 1442 at pp. 1445–1446.

[21] "Extravagant liberality and immoderate folly do not provide a passport to equitable relief," *per* Evershed M.R. in *Tufton* v. *Sperni* [1952] 2 T.L.R. 516 at p. 519; Tiley, p. 51.

[22] *Re Pauling's Settlement Trusts* [1964] Ch. 303.

[23] *Cf.* the relief given on mortgage principles in *Cityland and Property (Holdings) Ltd.* v. *Dabrah* [1968] Ch. 166 with the refusal of relief in a hire case, when the facts surely merited relief, in *Galbraith* v. *Mitchenall Estates* [1965] 2 Q.B. 473; Tiley, p. 65.

[24] *Galbraith* v. *Mitchenall Estates*, *supra*.

[25] *Bridge* v. *Campbell Discount Co. Ltd.* [1962] A.C. 600 at p. 614 *per* Viscount Simonds, at p. 626 *per* Lord Radcliffe. *Cf.* the greater willingness of Lord Denning, at pp. 629–631, to generalise.

[26] See the cases cited in the two previous notes.

some force, however, that the solution to current problems in this field is not to be found in more chance intervention by equity, but in properly thought out legislation.

It can clearly be seen, then, that "the establishment and enforcement of an equity" is not the same thing as meeting the needs of justice.[27] It is necessary to establish a ground of equitable intervention. Constructive fraud, though wide and flexible in the areas in which it is firmly established, is not a ground for equitable intervention in the problems of twentieth-century contract generally.

3. Misrepresentation

Not only in the field of constructive fraud, but also in that of ordinary commercial contracts, equity gave a wider protection than that afforded by common law fraud. Before *Derry* v. *Peek*,[28] equity had developed a jurisdiction whereby a defendant would, in appropriate circumstances, be compelled to "make good" certain representations that he had made.[29] A defendant might be required to make compensation if the representation could not be "made good" in any other way, and this came near to the awarding of damages. This aspect of equitable jurisdiction did not survive[30] *Derry* v. *Peek* but the equitable remedy of rescission remained available.

Rescission was of considerable help in cases where a plaintiff had been induced to a material degree as a result of a misrepresentation made to him by the defendant to enter into a contract with him. The contract could be rescinded in equity, leaving the plaintiff without an action for damages on the contract at common law.[31] Equity's jurisdiction was made dependent on the force of the misrepresentation on the defendant's mind, rather than on the relative importance of the fact misrepresented to the contract as a whole, or on the mental state of the defendant when he made it. Thus, whatever the position may have been in equity before *Derry* v. *Peek*, a plaintiff seeking rescission on this ground did not have to prove negligence or any other degree of fault in a defendant but only the fact of his own reliance on the statement, and its untruth. The remedy could easily be lost, however, by the acquisition of rights by third parties or even by acts of the plaintiff himself that amounted, even without his realising it, to

[27] *Per* Lord Evershed in *Simpson's Motor Sales* v. *Hendon Corp.* [1964] A.C. 1088 at p. 1127.

[28] (1889) 14 App.Cas. 337.

[29] See, *e.g.*, *Slim* v. *Croucher* (1860) 1 De G.F. & J. 518; (1952) 15 M.L.R. 325 (L. A. Sheridan); *post*, p. 665.

[30] *Low* v. *Bouverie* [1891] 3 Ch. 82.

[31] See *Redgrave* v. *Hurd* (1881) 20 Ch.D. 1.

"acceptance" of the subject-matter of the contract.[32] Acceptance was never accurately defined, but it is unnecessary to pursue the matter further, since the Misrepresentation Act 1967 provides more effective remedies in the majority of cases. Acceptance and performance by a plaintiff no longer operate in themselves as a bar to rescission.[33] Rescission is available on the merits of a case, whether or not there has been acceptance or performance; and damages may now be awarded wherever the court thinks it would be "equitable" to do so, in lieu of rescission.[34] The result intended would seem to be that damages are the most suitable remedy in cases of misrepresentations inducing a contract, save where the facts reveal a real justification for there being rescission of the contract as well. The exercise of the remedies for misrepresentation thus bears some relation to the exercise of the same remedies for breaches of the terms of a contract, in so far as rescission is confined to cases that really justify it. Section 2 of the Act is not free from difficulties, however; it may be noted particularly that section 2 (2), in providing for damages in lieu of rescission, appears to apply to cases of wholly innocent misrepresentations inducing a contract, while section 2 (1) appears to contemplate actions for damages for non-fraudulent misrepresentations inducing a contract being defeated if the defendant can show that "he has reasonable grounds to believe and did believe up to the time the contract was made that the facts represented were true." Apart from this anomaly, however, equity's remedy of rescission now forms part of a hierarchy of remedies for misrepresentations that are available generally to a plaintiff, instead of rescission being the only and not always very apposite remedy available in the absence of fraud. It is thus now more important as a supplementary than as a basic remedy. The history and rationale of the remedy is, however, of interest in considering rescission for mistakes not induced by misrepresentations.[35]

4. Mistake

A. Rescission

i. General. It has been seen that equity intervenes to rescind only on a substantial ground. While, therefore, mistake alone is an obvious ground for refusal of a decree of specific performance,[36]

[32] A conveyance or even a share transfer might prevent rescission in the absence of fraud: *Seddon* v. *North Eastern Salt Co.* [1905] 1 Ch. 326: *Angel* v. *Jay* [1911] 1 K.B. 666. *Cf.* on the Sale of Goods Act 1893, *Long* v. *Lloyd* [1958] 1 W.L.R. 753.

[33] s. 1.

[34] s. 2 (2); (1967) 30 M.L.R. 369 (G. H. Treitel and P. S. Atiyah).

[35] Tiley, pp. 35–36.

[36] *e.g.*, *Wood* v. *Scarth* (1855) 2 K. & J. 33, *ante*, p. 649.

mistake alone is not an obvious ground for rescission. And a mistake induced by fraud, or by misrepresentation, or deliberately not corrected in a situation that called for full disclosure [37] is a more compelling case than a mistake arising without the responsibility of the other party. If two parties in ordinary circumstances contract or enter into a deed and one makes a mistake concerning it, the general principle is that behind the maxim *caveat emptor*; a party who knows he is making a better bargain than the other is under no duty to divulge the fact. A party who wishes to secure a form of guarantee as to any aspect of the transaction must raise the matter at the time and have it dealt with on the basis of representation or a term of the contract. All this is inherent in freedom of contract; but it is subject to some limits even at common law. For instance, a party cannot remain silent when he knows the other party is mistaken as to what the actual terms of the contract are,[38] or in certain cases of mistake as to the identity of the person contracted with.[39]

Equity does not disturb these long-established principles. It is true that equity has limited their effect when it has granted rescission on a ground not recognised at law, but it does not grant rescission except on a recognised ground. Generally speaking, the mistake of a plaintiff is no ground as such for rescission, but only when coupled with, for example, a misrepresentation that induced it. Thus there is no separate set of rules in equity relating to rescission for mistakes as to the person or mistakes as to the extent of the terms of a contract.[40]

Nevertheless, there are two reservations to be made to this generalisation, and they are reservations of quite different sorts. First, there is equity's attitude to cases where both the parties have made the same mistake; here, rescission is sometimes granted on the ground of mistake alone. Secondly, there is equity's remedy of rectification [41] which sometimes has the effect of intervening in cases of mistake on a wider basis than would appear from the orthodox statement of the remedy.

ii. Mistake Common to Both Parties. The law concerning a mistake made in common by both parties is difficult to state due to common law's own ambivalent attitude to it. It has been said at various times that such a mistake may be so fundamental as to render an

[37] *e.g.*, *Gordon* v. *Gordon* (1816) 3 Swan. 400, *ante*, p. 651.
[38] *Smith* v. *Hughes* (1871) L.R. 6 Q.B. 597; *Hartog* v. *Colin & Shields* [1939] 3 All E.R. 566.
[39] *Cundy* v. *Lindsay* (1878) 3 App.Cas. 459; *Ingram* v. *Little* [1961] 1 Q.B. 31.
[40] The judgment of Denning L.J. in *Solle* v. *Butcher* [1950] 1 K.B. 671 at pp. 692–693 contains propositions asserting a wider equitable jurisdiction than is usually accepted. See (1961) 24 M.L.R. 421 (P. S. Atiyah and F. A. R. Bennion).
[41] *Post*, p. 661.

apparent contract based on it necessarily void,[42] and at the other extreme that, if there is an apparent agreement on all points, then the contract can be avoided only by reference to the further intention of the parties or by equity.[43] This is a larger problem than can be solved here, but the cases in equity can be considered to a substantial degree apart from it.

In *Cooper* v. *Phibbs*,[44] Cooper agreed to rent a salmon fishery from Phibbs, who was a trustee of a settlement. But the fishery had in fact already descended under an entail to Cooper. It had been generally believed that the fishery was not subject to the entail and, in this belief, substantial sums had already been spent in improving it by members of the family now represented by Phibbs. Phibbs made no misrepresentation to Cooper that could be said to have induced Cooper's false belief that the fishery was outside the entail (though one may have been made by other members of the family now dead), and so the validity of the agreement to rent the fishery could be attacked only on the ground of common mistake. Cooper brought an action requesting cancellation of the agreement upon suitable terms; it was thought at first instance that mistake as such, even though common, afforded no ground of relief. The House of Lords disagreed; the rule was laid down in Lord Westbury's oft-quoted words: "If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake."[45] Thus equity may rescind for common mistake alone; in such a case, rescission will be on such terms as appear to equity to be just; in this way Cooper obtained rescission of the agreement only on the terms of admitting a lien in favour of Phibbs' beneficiaries in respect of the sums spent on improving the fishery.

Equity's jurisdiction has been reaffirmed in subsequent cases, and in the widest language.[46] The jurisdiction has not been confined to mistakes of fact in any technical sense; it has been said that it should not be exercised in respect of mistakes as to public law such as the

[42] *Bell* v. *Lever Bros.* [1932] A.C. 161; *Scott* v. *Coulson* [1903] 2 Ch. 249.
[43] *McRae* v. *Commonwealth Disposals Commission* (1951) 84 C.L.R. 377; *Solle* v. *Butcher* [1950] 1 K.B. 671; (1954) 70 L.Q.R. 385 (C. J. Slade); (1957) 73 L.Q.R. 340 (P. S. Atiyah); *Magee* v. *Pennine Insurance Co.* [1969] 2 W.L.R. 1278.
[44] (1867) L.R. 2 H.L. 149; (reversing (1865) 17 Ir.Ch.Rep. 73); Tiley, p. 36.
[45] (1867) L.R. 2 H.L. 149 at p. 170.
[46] *e.g.*, Lord Chelmsford in *Earl Beauchamp* v. *Winn* (1873) L.R. 6 H.L. 223 at pp. 233–234.

construction of a statute,[47] and that it should not be exercised in cases where parties have finally settled their difference but on an assumption which has since turned out to be false in point of law.[48] Attempts to formulate the jurisdiction more precisely in terms of "mistakes as to private rights" have not proved successful.

> In *Solle* v. *Butcher*,[49] a flat was leased for seven years on an erroneous assumption (made by both parties) that structural alterations had taken the premises out of the provisions of the Rent Restriction Acts imposing rent control. An action by the lessee to recover rent already paid in excess of that permitted by the Acts was met by the landlord's successful claim for rescission of the lease on "just and equitable" terms, on the ground of common mistake.

The judgments in the Court of Appeal reveal a variety of possible views on the nature of the mistake. It can be viewed as one of fact, of private rights, of misconstruction of a statute, of misapprehension of the legal consequences of an agreement; and this variety is not surprising, as it is not feasible to distinguish the causes, natures and effects of mistakes in this way. There are elements of each in the mistake as it is eventually made, so that the only question for the courts can be whether it is right in a general sense to remedy by rescission the particular mistake in question, and this jurisdiction cannot be limited by reference to the kind or type of mistake made.

iii. Policy Considerations. The question of the availability of rescission should therefore be answered only after considering the issues involved. For instance, would remedying a common mistake by rescinding a contract lead to insecurity of a certain type of contract, as in *Rogers* v. *Ingham*? [50] Further, the effect of the common law view of the question should be considered as a matter of policy before deciding whether equity should intervene by rescission.[51] These wide aspects are in fact implicit in some cases in which rescis-

[47] Lord Westbury and Lord Chelmsford both appear mindful of the need to make this reservation.

[48] *Rogers* v. *Ingham* (1876) 3 Ch.D. 351; contrast the facts in *Gordon* v. *Gordon* (1816) 3 Swan. 400, *ante*, p. 651.

[49] [1950] 1 K.B. 671 (C.A., Jenkins L.J. dissenting). See Jackson, *Principles of Property Law*, pp. 334, 358–364.

[50] (1876) 3 Ch.D. 351; *supra*, note 48.

[51] Thus the considerations discussed in *McRae* v. *Commonwealth Disposals Commission* (1951) 84 C.L.R. 377, based on the intentions and responsibilities of the parties, would seem to be a matter for determination prior to consideration of the question of rescission in equity. Yet the common law aspects are not fully discussed in cases such as *Solle* v. *Butcher*, *supra*, or *Grist* v. *Bailey* [1967] Ch. 532, *post*, p. 660. But see Winn L.J. (dissenting) in *Magee* v. *Pennine Insurance Co.* [1969] 2 W.L.R. 1278 at p. 1285.

sion has been refused, for instance *Bell* v. *Lever Bros.*[52] and the contemporaneous case of *Munro* v. *Meyer*.[53] In the latter case, parties varied the provisions of a contract for the purchase of meal without it being realised that the meal in question did not comply with the terms of the original contract; this erroneous assumption did not vitiate the agreement to vary, which was on several grounds not suitable for rescission in equity. But the reasons given for refusing relief in equity are not always clearly expressed, and it is submitted that the reason for this lack of clarity is that the availability of rescission is not always seen as a straight policy issue. Nor are the cases in which rescission has been granted more helpful, as they rely, in the main, on past statements of the general jurisdiction. If, however, the exercise of the remedy can be seen as one of general policy, it can be understood why the cases in which the remedy has in fact been exercised involve fairly restricted areas of fact, areas where equitable intervention is not unhelpful in order to deal with the complicated situations that the parties have arrived at.[54]

It can be seen also that this wide doctrine of rescission has less scope in ordinary commercial transactions. The common law is more disposed to examine such cases on their merits, and in many cases it will be best to let the loss lie where it falls. In such circumstances there is no need for the application of a doctrine like rescission which will readjust the loss. This can be perceived particularly well on the facts of *Oscar Chess* v. *Williams*.[55]

> A car was disposed of to a garage without there being, as it was held by a majority of the Court of Appeal, any warranty as to its age. Both parties had in fact relied on the car's log-book, on which the car's date of manufacture had been altered from 1939 to 1948, by some person unknown. Not only was there no term of the contract as to the car's age, but the garage had not been misled by anything said by the owner of the car. The result was that the loss due to mistake fell on the garage; no ground of action was available against the former owner. But in a dictum,[56] Denning L.J. canvassed the possibility of rescission for common mistake. This seems an unsuitable case for rescission. The effect of rescission would be to make the former

[52] [1932] A.C. 161. A central fact in this case is that the contract did not fall to be treated as a contract *uberrimae fidei*. Thus, even if Bell had had all the relevant facts in mind at the time of entering into the contract, he would have been under no duty to disclose them on his own initiative.

[53] [1930] 2 K.B. 312 (Wright J., who tried *Bell* v. *Lever Bros.* a few days later).

[54] *e.g.*, in *Cooper* v. *Phibbs* and *Solle* v. *Butcher*, *ante*, pp. 657, 658.

[55] [1957] 1 W.L.R. 370.

[56] [1957] 1 W.L.R. 370 at p. 374: he did not proceed with this possibility as in his view too long a period of time had elapsed.

> owner pay a sum of money to the garage which was in excess of the value of the car which he would get back in exchange; he could only dispose of the car for a smaller sum. This is not different in effect from an award of damages, for which the court held there was no justification.

Despite, therefore, the very wide statement of the remedy to be found in some cases and the impossibility of limiting its width by reference to types or kinds of mistake, its exercise is to be associated with a comparatively narrow range of cases. These cases concern land more than commerce in the wider sense, and tend to involve mistakes as to private rights more than mistakes as to facts or to qualities. To be more exact than that, however regrettable, is not possible.

iv. A Recent Formulation of the Remedy. In *Grist* v. *Bailey* [57]

> A freehold house was sold for £850 in a belief shared by both parties that it was subject to a protected tenancy; in fact no protected tenancy existed, in which event a fair price would have been £2,500. The vendor refused to complete the purchase and successfully claimed rescission of the contract for sale; but rescission was made subject to an undertaking that he would sell to the purchaser at a proper price. Goff J. treated *Solle* v. *Butcher* [58] as authority for the exercise on such facts of the remedy of rescission, subject to (1) the mistake being common and (2) sufficiently fundamental, and (3) the vendor not being at fault.

That the mistake must be one common to both parties is obviously vital to the remedy; indeed, it might not be proper to grant rescission save in a case, as here, where both parties had very clearly acted on the common assumption (of the protected tenancy) and had never thought of questioning it. This actuality of the mistake is perhaps more vital to an understanding of the remedy than the "fundamental" character of the mistake, which is a natural qualification in the remedy of rescission. The concept of the vendor not being "at fault" is more enigmatic; it appears to reflect the discretionary nature of the remedy, and permits of all the factors leading to the creation of the contract being taken into account.[58a] Thus, if the vendor had been at fault in any material way in not appreciating the circumstances of the tenancy, the loss might have remained on him, as common law would have ordained. The discretionary character

[57] [1967] Ch. 532; Tiley, p. 38; Jackson, *Principles of Property Law*, p. 361.
[58] [1950] 1 K.B. 671.
[58a] Nothing in *Magee* v. *Pennine Insurance Co.* [1969] 2 W.L.R. 1278 conflicts with the views here expressed, but Winn L.J.'s dissenting judgment is persuasive.

of the remedy is also emphasised by the rescission being granted on the terms which appear to the court to be just and equitable,[59] providing in this case for the sale of the house at a fair price.

B. Rectification

i. Mistake in Drafting. If an instrument contains a manifest mistake in its drafting, neither common law nor equity are prevented from discerning the fact and substituting the words that were intended to be there. But this is a limited jurisdiction for it applies only when the mistake is obvious from the instrument itself *and* what should have been written is obvious too.[60] This jurisdiction is one based on the duty of the court to construe documents correctly and is not a jurisdiction to rectify as such, as is the remedy now to be discussed.

ii. Rectification to Conform to Intention. Rectification of an instrument [61] is a distinct equitable remedy, based on the fact of an instrument not according with the intentions of the parties to it. It must be very clearly shown that the parties had come to a final and genuine agreement and that the instrument had failed to record it. Oral evidence is admissible to prove the agreement, and there is no need to show anything in the nature of error on the face of the instrument; but the evidence of the agreement must be compelling.[62] The crux of the remedy is proof of what the parties actually had decided at the time of reaching their agreement [63] and not what they, or one of them, had thought at a later date, or what they might have thought if they had considered the matter in greater detail or in the light of more information than that available to them. In other words, the remedy exists to correct, but not to improve, an instrument. Thus in *Whiteside* v. *Whiteside*,[64] rectification was refused of a covenant that mistakenly used the phrase "free of tax," as the parties had never come to an actual agreement on the phrase that would best have met the tax situation. Again, a mistake as to the subject-matter of a

[59] *Cf.* the much more complicated terms in the rescission decree in *Solle* v. *Butcher* [1950] 1 K.B. 671 at 697, *ante*, p. 658. These terms reflect the need to bear the very complicated and restrictive provisions of the Rent Acts in mind in order to do justice. The court was in fact anxious to prevent the lessee from being able to stay on for the whole seven years at a low rent, and equally anxious to prevent the lessor from being able to give him notice to quit.

[60] *Re Bacharach's W.T.* [1959] Ch. 245 is a modern example involving a will; wills are not within the equitable remedy of rectification considered in this section.

[61] Distinguish cancellation of an instrument that is void or voidable on some ground, *e.g.*, forgery: *Peake* v. *Highfield* (1826) 1 Russ. 559.

[62] *Fowler* v. *Fowler* (1859) 4 De G. & J. 250.

[63] This agreement need not itself have been embodied in a binding legal form if it was clearly the basis on which the instrument to be rectified rested: *Shipley U.D.C.* v. *Bradford Corpn.* [1936] Ch. 375.

[64] [1950] Ch. 65. *Cf. Constantinidi* v. *Ralli* [1935] Ch. 427.

contract cannot be rectified in the documents embodying the contract if the parties had made the mistake when entering into the contract in the first place.[65] But where both a written agreement to sell land and the ensuing conveyance incorrectly described the land which it had been agreed to sell, it was possible to obtain rectification on proof of the real oral agreement.[66] Rectification can also be obtained of a voluntary deed, such as a settlement, if the court is satisfied on the evidence that the donor's real intent at the time of entering into it was not accurately reflected in the instrument.[67]

iii. Rectification, Rescission and Unilateral Mistake. As enunciated above, the remedy of rectification does not affect cases where parties actually entered into an obligation under a common or unilateral mistake. Apparent extensions of rectification must, however, be considered. There is a line of nineteenth-century cases in which rectification appears to be an alternative to rescission.

> In *Paget* v. *Marshall*,[68] a lessor claimed that the lease contained a demise of the first floor of the premises in error, as the first floor was intended to be excluded from the lease. The lessee denied that the lease did not correspond with his intentions, so that the case appears to have been one calling for a finding of fact as to what the real *consensus ad idem*, if any, was.[69] But the lessor's claim was that the lessee should be put to an election between rescission of, or rectification of, the lease, and Bacon V.-C. considered the case on this footing and upheld the claim on the ground, apparently, of the lessor's unilateral mistake. The lessee in fact submitted to rectification.

Unilateral mistake is no ground as such for rectification, however, so the correctness of the decision would seem to stand or fall on the availability of rescission. If there was a ground on the facts of the case for rescission, that rescission could be on terms, and there is no reason why an option of rectification should not be part of those terms.[70] But whether there was a sufficiently specific finding of fact by Bacon V.-C. to justify rescission is doubtful. In any event, the

65 *Frederick E. Rose (London) Ltd.* v. *William H. Pim Jnr. & Co. Ltd.* [1953] 2 Q.B. 450; Tiley, p. 135.

66 *Craddock Bros.* v. *Hunt* [1923] 2 Ch. 136.

67 *Banks* v. *Ripley* [1940] Ch. 719 (internal evidence in the deed held sufficient); *cf. Bonhote* v. *Henderson* [1895] 1 Ch. 742; [1895] 2 Ch. 202.

68 (1884) 28 Ch.D. 255; Tiley, p. 138; the last of the line. Criticised in *May* v. *Platt* [1900] 1 Ch. 616.

69 *Cf. Tamplin* v. *James* (1880) 15 Ch.D. 215; Tiley, p. 42; and *Torrance* v. *Bolton* (1872) L.R. 8 Ch.App. 118.

70 *Cf.* the terms imposed in *Solle* v. *Butcher* [1950] 1 K.B. 671 and *Grist* v. *Bailey* [1967] Ch. 532; Tiley, p. 38; *ante*, pp. 658, 660.

case has not been sufficiently immune from criticism to justify the assertion that rectification may extend generally to unilateral mistakes.

A further development occurred in *A. Roberts & Co. Ltd.* v. *Leicestershire County Council.*[71]

The plaintiff had undertaken to build a school for the defendant. Their actual agreement was for completion of the school within eighteen months, but agents of the defendant altered "eighteen" to "thirty" in the draft contract without telling the plaintiff, whose agents signed it without noticing the difference. The plaintiff claimed that the agreement should be rectified by substituting eighteen for thirty and Pennycuick J. agreed with this claim. He found, however, that one of the defendant's agents had appreciated the plaintiff's mistake, and this fact would, as in *Paget* v. *Marshall*,[72] appear to turn this use of rectification as a remedy into one that was supplemental to a right already existing at common law,[73] rather than as a remedy given by equity in the absence of any common law protection. The remedy of rectification was in fact the most convenient remedy available since, in view of the fact that the school was already built, it would have been inconvenient to render the contract void, thus forcing the plaintiff into quasi-contract.

[71] [1961] Ch. 555; Tiley, p. 139.
[72] (1884) 28 Ch.D. 255.
[73] *Cf. Hartog* v. *Colin & Shields* [1939] 3 All E.R. 566; *ante*, p. 656.

CHAPTER 34

ESTOPPEL

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1. THE DOCTRINE

ESTOPPEL is a doctrine which prevents (estops) a person acting inconsistently with a representation which he has made to the other party, in reliance on which the other party has acted to his detriment.[1]

A. Common Law and Equity

The doctrine has long been recognised at law and equity. Spencer Bower thought that it was, to all intents and purposes, identical at law and in equity.[2] The same view was taken by Lord Russell of Killowen in *Canadian Pacific Railway* v. *R.*[3]; and Lord Selborne in *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans*[4] stated the doctrine of equitable estoppel in terms which do not differ materially from those in which the common law doctrine is generally expressed.

The common law and equitable doctrines are sometimes distinguished on the ground that common law estoppel is a mere rule of evidence, denying the right of a party to put forward an argument or claim inconsistent with the representation on which the other party relied to his detriment; while estoppel in equity gives rise to substantive rights in that it may operate to give to the representee the right to claim title to land or goods.

[1] See Lord Denman C.J. in *Pickard* v. *Sears* (1837) 6 A. & E. 469 at p. 474; (1951) 67 L.Q.R. 330 at p. 332 (J. F. Wilson); (1952) 15 M.L.R. 325 at p. 327 (L. A. Sheridan).

[2] Spencer Bower and Turner, *Estoppel by Representation* (2nd ed.), p. 12.

[3] [1931] A.C. 414 at p. 429.

[4] (1873) L.R. 6 H.L. 352 at p. 360.

The view that estoppel operates in equity to grant affirmative relief is also based upon the rule that a person who made a representation must in equity make it good; *i.e.*, "the parties must be dealt with on the footing that the statement is true. But the pretence does not make it true, and it may be necessary to do something further in order to bring that about." [5] That may be done by a conveyance [6]; or, if that is not possible, by compensation.[7] It will be seen that such a doctrine would lie uncomfortably with many other accepted principles. It would mean, in effect, that compensation could be obtained for loss in reliance upon certain non-fraudulent misrepresentations [8]; and that a conveyance could be ordered in favour of a volunteer, even though there was no agreement to do so. It is submitted that the doctrine is too widely stated. Estoppel is essentially a doctrine which operates negatively, preventing a person from acting inconsistently with his representation.

B. Negative Operation

Although there are some long-established exceptions,[9] it now seems clear that estoppel works negatively. A plaintiff cannot sue on an estoppel; he must have an independent cause of action.[10] The doctrine then works to prevent a party from relying upon a point which is inconsistent with the representation upon which the other party relied to his detriment. It works like a rule of evidence; a rule which excludes a particular defence or line of argument. Thus, an owner of goods will be estopped from claiming them if he stood by at the sale, thereby indicating that he was not the owner, and encouraging the sale. If he sues the purchaser in trover, he will be estopped.[11]

This is not to say that estoppel is available only to a defendant. A plaintiff may take advantage of the doctrine if he has an independent cause of action, and can show that the defence is inconsistent with a representation of the defendant on which he relies.

A principal who holds out another as his agent will be liable to be sued as if the agency existed [12]; and an agent who holds himself

[5] (1952) 15 M.L.R. at p. 328 (L. A. Sheridan); (1963) 79 L.Q.R. 238 (D. E. Allan); (1965) 81 L.Q.R. 84 at p. 223 (D. C. Jackson).
[6] *Hunt* v. *Carew* (1649) Nels. 46.
[7] *Burrowes* v. *Lock* (1805) 10 Ves.Jr. 470.
[8] As eventually provided by the Misrepresentation Act 1967.
[9] *e.g.*, a lease by estoppel, M. & W., p. 651 *et seq.*; see also *Stiles* v. *Cowper* (1748) 3 Atk. 692; *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129; *post*, p. 680.
[10] *Low* v. *Bouverie* [1891] 3 Ch. 82.
[11] *Pickard* v. *Sears* (1837) 6 A. & E. 469; *Gregg* v. *Wells* (1839) 10 A. & E. 90; Sale of Goods Act 1893, s. 21.
[12] *Scarfe* v. *Jardine* (1882) 7 App.Cas. 345 at p. 349; *Debenham* v. *Mellon* (1880) 5 Q.B.D. 394 at p. 403.

out as possessing an authority will also be liable.[13] A company which issues a share certificate will be estopped from denying, as against a purchaser without notice, that the person named therein is the owner of the shares,[14] and from alleging that the shares are not fully paid.[15]

In *Robertson* v. *Minister of Pensions*,[16] an officer claimed a pension, relying upon a statement by the War Office that his disability had been accepted as due to military service, and forbore to obtain an independent medical opinion. It was held that the Crown, through the Minister of Pensions, could not go back on the statement previously made. The officer was no longer in a position to supply the necessary evidence; but the Minister was estopped from denying that he qualified.

On the other hand, in *Low* v. *Bouverie*,[17] a trustee failed to disclose to an intending mortgagee certain previous dealings which had taken place in relation to the equitable interest of a beneficiary. The trustee acted negligently but innocently. No action was recognised at that time for negligent misrepresentation.[18] The security was insufficient, and the plaintiff sought to make the trustee liable for the loss which he suffered in reliance upon the representation of the trustee; but the Court of Appeal held that no action lay.

2. The Requirements for the Operation of the Doctrine of Estoppel

It is necessary that there should be an unambiguous representation of existing fact upon which the representee is intended to act and does act to his detriment.

A. Unambiguous Representation

A further reason for the failure of the action in *Low* v. *Bouverie*[19] was that the reply given by the trustee was not sufficiently precise. Bowen L.J. stated this requirement as follows: ". . . an estoppel, that is to say, the language upon which the estoppel is founded, must be precise and unambiguous. That does not necessarily mean that the language must be such that it cannot possibly be open to different

13 *Collen* v. *Wright* (1857) 8 E. & B. 647; *Yonge* v. *Toynbee* [1910] 1 K.B. 215.
14 *Re Bahia and San Francisco Ry.* (1868) L.R. 3 Q.B. 584.
15 *Burkinshaw* v. *Nicolls* (1878) 3 App.Cas. 1004.
16 [1949] 1 K.B. 227; *Combe* v. *Combe* [1951] 2 K.B. 215 at p. 219, *per* Denning L.J.
17 [1891] 3 Ch. 82.
18 *Derry* v. *Peek* (1889) 14 App.Cas. 337.
19 [1891] 3 Ch. 82 at p. 106.

constructions, but that it must be such as will be reasonably understood in a particular sense by the person to whom it is addressed."

B. Representation of Fact

The representation may be by words [20] or conduct [21] or by silence,[22] but it must be a representation of existing fact and not a representation of law [23] or of intention.

In *Jorden* v. *Money*,[24] Louisa Jorden became entitled to enforce a bond against the plaintiff for the payment of a sum of money. She repeatedly and in emphatic language promised never to enforce it, and, in reliance upon those promises, the plaintiff married. Later she sued to enforce the bond, and the plaintiff sought to restrain her. He succeeded before Romilly M.R.; on appeal, the two Lords Justices, Lord Cranworth and Knight-Bruce L.JJ., disagreed. Unhappily for Money, Lord Cranworth, who had favoured reversal, became Lord Chancellor while the appeal was pending, and he and Lord Brougham, with Lord St. Leonards dissenting, allowed the appeal and held that the bond could be enforced. There was no contract between the parties; and the defendant's representations were statements of what she intended to do, and not what she had done.

An inexorable distinction was thus drawn between words indicating an existing state of fact, and words indicating a mere intention. Such a rule seems to be neither necessary nor practical. It has obstructed an orderly development of the doctrine of estoppel; and it necessitates the acceptance, as substantial, of a distinction which is merely one of words: the distinction between "I will not enforce the bond" and "I have cancelled the bond."

The effect of this rule has been much reduced by the development of the doctrine of promissory estoppel. Indeed it is difficult to see how the rule is consistent in principle with some of the older cases in which a person has either encouraged or permitted another to act to his detriment and has then been prevented from acting inconsistently with his express and implied indication of intention.[25]

[20] *Hunt* v. *Carew* (1649) Nels. 46.
[21] *Waldron* v. *Sloper* (1852) 1 Drew. 193.
[22] *Hunsden* v. *Cheyney* (1690) 2 Vern. 150; *Fung Kai Sun* v. *Chan Fui Hing* [1951] A.C. 489.
[23] *Territorial and Auxiliary Forces Ass. of the County of London* v. *Nichols* [1949] 1 K.B. 35: *Kai Nam* v. *Ma Kam Chan* [1956] A.C. 358.
[24] (1854) 5 H.L.Cas. 185.
[25] *Post*, p. 668 *et seq.*

C. Detriment of the Representee

It is the detriment suffered in reliance on the representation that brings estoppel into play.[26] In most cases such as those in the examples of the operation of the doctrine discussed above,[27] the prejudice suffered by the representee can only be remedied by excluding for all time the claim of the representor, and the effect of an estoppel thus becomes perpetual.[28]

3. Promissory Estoppel

A. The Doctrine

Where, by words or conduct, a person makes an unambiguous representation as to his future conduct, intending the representation to be relied on, and to affect the legal relations between the parties,[29] and the representee alters his position in reliance on it, the representor will be unable to act inconsistently with the representation if by so doing the representee would be prejudiced.[30]

The doctrine emerged in *Hughes* v. *Metropolitan Railway Co.*[31]

> The Metropolitan Railway Company were lessees of premises. The lessor served upon them a notice to effect certain repairs within six months, in default of which the lease was liable to be forfeited. The company suggested that the lessor should accept a surrender of the lease. Negotiations continued for some months, but terms could not be agreed.
>
> Within days of the expiry of the six months, the company wrote to the lessor to say that they would do the repairs, but the lessor brought an action for possession, claiming that the lease was forfeited for breach of covenant. The House of Lords held that there was no forfeiture, for the negotiations between the parties had the effect of suspending the notice. It must be emphasised that the notice was only suspended; the company was not relieved of its duty to repair.

The doctrine developed through a line of cases which was little known until 1947. Denning J. then applied it to the problem of waiver of rights under a contract in *Central London Property Trust Ltd.* v. *High Trees House Ltd.*[32]

26 *Fung Kai Sun* v. *Chan Fui Hing* [1951] A.C. 489.
27 *Ante*, pp. 665–666.
28 In that respect the doctrine differs, as will be seen, from the related doctrine of promissory estoppel. *Post*, p. 671.
29 *Foot Clinics* (1943) *Ltd.* v. *Coopers' Gowns Ltd.* [1947] K.B. 506.
30 See *Combe* v. *Combe* [1951] 2 K.B. 215 at p. 220.
31 (1877) 2 App.Cas. 439.
32 [1947] K.B. 130; *Birmingham and District Land Co.* v. *L. and N.W. Ry.* (1888) 40 Ch.D. 268; *Panoutsos* v. *Raymond Hadley Corp. of New York* [1917] 2

The plaintiff company in 1937 leased to the defendant (a subsidiary of the plaintiffs) a block of flats for 99 years at a rent of £2,500 a year. Early in 1940, and because of the war, the defendants were unable to find sub-tenants for the flats, and unable in consequence to pay the rent. The plaintiffs agreed to reduce the rent to £1,250 from the beginning of the term. By the beginning of 1945 all the flats were let, and the plaintiffs claimed the full rent as from the middle of that year. They succeeded. Denning J., however, stated that they would have been estopped from claiming the full rent for the period from 1940 to 1945, on the ground that though not technically bound because of the lack of consideration, the plaintiffs had intended the defendants to rely on the promise and the defendants had acted on the faith of it.

B. Special Characteristics of Promissory Estoppel

It will be seen that this doctrine contains a number of features which are, or may be, different from those of estoppel as previously considered.[33]

i. Representation of Intention. The material representation may be one of intention and not one of fact. It is sufficient that the representor states his intention or makes a promise, intending that the other party should rely on it. It seems that this doctrine must necessarily be distinct from estoppel, because of the House of Lords decision in *Jorden* v. *Money*[34] that a representation can only raise an estoppel if it is a representation of fact. Indeed, the *High Trees* doctrine has been called quasi-estoppel,[35] or "more aptly" promissory[36] estoppel (or misnamed equitable estoppel) in order to distinguish it. On the other hand, one may regard the doctrine as a development of estoppel, saying with Denning J., that "the law has not been standing still since" 1854[37]; or take the view that the decision of *Jorden* v. *Money* is inconsistent with the principle of *Hughes* v. *Metropolitan Railway*.[38] Whatever way of escape is applied, the

K.B. 473; *Salisbury (Marquess)* v. *Gilmore* [1942] 2 K.B. 38; *Ledingham* v. *Bermejo Estancia Co.* [1947] 1 All E.R. 749.

[33] See generally (1947) 63 L.Q.R. 283 (G. C. Cheshire and C. H. S. Fifoot); (1951) 67 L.Q.R. 330 (J. F. Wilson); (1952) 15 M.L.R. 1 (Denning L.J.); (1952) 15 M.L.R. 325 (L. A. Sheridan); (1964) 1 N.Z.U.L.R. 232 (I. D. Campbell); (1965) 81 L.Q.R. 84, 223 (D. C. Jackson).

[34] (1854) 5 H.L.Cas. 185; *ante*, p. 667.

[35] (1951) 67 L.Q.R. 330 (J. F. Wilson).

[36] *Ajayi* v. *R. T. Briscoe (Nig.) Ltd.* [1964] 1 W.L.R. 1326 at p. 1330; see also *per* Buckley J. in *Beesly* v. *Hallwood Estates Ltd.* [1960] 1 W.L.R. 549, 560.

[37] [1947] K.B. 130 at p. 134.

[38] (1877) 2 App.Cas. 439.

fact remains that the effect of *Jorden* v. *Money*[39] has been greatly reduced by later developments.

ii. Detriment. The requirement of detriment to the representee is less stringent in the case of promissory estoppel. Financial loss or other detriment is of course sufficient; but it seems that it is not necessary to show more than that the representee committed himself to a particular course of action. In *Central London Property Trust Ltd.* v. *High Trees House Ltd.*[40] itself, it is difficult to find a detriment in any materialistic sense. To pay a reduced rent is nothing but an advantage. If the full rent for the whole period had been claimed, it could be said that there was a disadvantage in being called upon to pay the accumulated rent in 1945; but this could have been met by extending the time for payment. The real point however is that in the years 1941–45, the tenants' plans were based on an assumption that the full rent would not be demanded. If it had not been so understood, greater effort might have been made to sub-let, or the lease might have been surrendered, or the tenants might have gone into liquidation.[41] It is impossible to know. The tenants' freedom of choice was restricted by the undertaking; the representor cannot be allowed to put the clock back.

The remedy was not available, however, in *Ajayi* v. *R. T. Briscoe (Nigeria) Ltd.*[42] where it was not shown that the representee had relied on the representation at all. It is for this reason doubtful whether the remedy would have been available to the appellant in *Foakes* v. *Beer*,[43] even if it had been pleaded. Mrs. Beer had agreed, in consideration of the payment of a judgment debt by instalments, to take no further proceedings on the judgment. The promise to pay what was already due was held to have been made without consideration. The issue of promissory estoppel was not raised.[44] There is, however, no suggestion that Dr. Foakes acted in any particular way due to, and in reliance on, Mrs. Beer's promise. It will be appreciated that equity is not concerned to find a way of cancelling an obligation without consideration, but only a method of cancelling out any additional prejudice which a representee may have suffered.[45] " When

39 (1854) 5 H.L.Cas. 185.
40 [1947] K.B. 130, *ante*, p. 668.
41 This would have been no disaster, for the tenants were, it will be remembered, a subsidiary company of the plaintiff.
42 [1964] 1 W.L.R. 1326.
43 (1884) 9 App.Cas. 605.
44 Although Lords Selborne and Blackburn had participated in the decision in *Hughes* v. *Metropolitan Ry.* (1877) 2 App.Cas. 439.
45 (1958) 21 M.L.R. 185 (L. A. Sheridan). Cases earlier than *Hughes* v. *Metropolitan Ry.* (*supra*), such as *Cross* v. *Sprigg* (1849) 6 Hare 552 and *Yeomans* v. *Williams*

the conditions of applicability are present, in my view, it is then for the court to decide whether it would be inequitable to allow the party seeking so to do to enforce the strict rights which he has induced the other party to believe will not be enforced." [46] This test is not "co-terminous" [47] with detriment. "Doubtless promissory estoppel will most frequently succeed where there is detriment to the promisee . . ." but "enforcement of the original obligation may be inequitable without any detriment (in the narrow sense) and . . . the categories of what is inequitable can never be closed." [47]

iii. Withdrawal. It follows that the representor may escape from the burden of this equity if he can ensure that the representee is not thereby prejudiced. What must be done will depend upon the circumstances of each case. In many cases, such as those in which the representee has not suffered material detriment in reliance on the representation, it may be that nothing more than reasonable notice of intention to withdraw is required. Even this may not be necessary. In the *High Trees* [48] case, the full rent could be claimed when the war was over; and the changed circumstances were so obvious that no notice of intention to restore the original position was necessary.

In *Tool Metal Manufacturing Co.* v. *Tungsten Electric Co.*,[49] the appellants (Tool Metal) were registered proprietors of a patent concerning the manufacture of certain hard metal alloys. They permitted the respondents (Tungsten) to manufacture a limited amount of these alloys, the agreement providing that the defendants should pay a sum as "compensation" if they manufactured in excess of the permitted amount.

In 1942, Tool Metal agreed to suspend these payments pending the negotiation of a new agreement. In 1945, Tungsten sued Tool Metal for breach of contract, and Tool Metal counterclaimed for the compensation payments but failed because of the waiver of 1942.

In 1950, Tool Metal claimed compensation payments due as from January 1, 1947, and succeeded. The House of Lords

(1865) L.R. 1 Eq. 184, show that equity is much more ready to regard a periodic payment as cancelled once and for all than a capital payment. What equity will ordinarily do in the latter case is to make an order providing for payment over an extended period. These precedents seem to have escaped much attention.

[46] *Per* MacGregor J. in *P.* v. *P.* [1957] N.Z.L.R. 854 at p. 859. See also *Inwards* v. *Baker* [1965] 2 Q.B. 29; Tiley, p. 71; *E. R. Ives (Investment) Ltd.* v. *High* [1967] 2 Q.B. 379; Tiley, p. 75.

[47] (1958) 21 M.L.R. at pp. 185, 186 (L. A. Sheridan). Relief may be withheld in the interests of justice; *D. & C. Builders Ltd.* v. *Rees* [1966] 2 Q.B. 617.

[48] [1947] K.B. 130.

[49] [1955] 1 W.L.R. 761.

held that the counterclaim of 1945 constituted sufficient notice of Tool Metal's intention to terminate the waiver of the right to compensation even though no express date for the termination had been stated.

If it is impossible to restore the original position the effect of the estoppel may become permanent.[50] The matter was summed up by Lord Hodson in *Ajayi* v. *R. T. Briscoe (Nigeria) Ltd.*[51]

"When one party to a contract in the absence of fresh consideration agrees not to enforce his rights an equity will be raised in favour of the other party. This equity is, however, subject to the qualifications (1) that the other party has altered his position, (2) that the promisor can resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position, (3) the promise only becomes final and irrevocable if the promisee cannot resume his position."

iv. A Shield and not a Sword. Promissory estoppel cannot itself be the basis of an action. In the area of waiver or discharge of contractual rights, it is necessary to distinguish clearly the cases where there is consideration for the waiver, which is properly a contractual situation, and those where the promisee must rely on estoppel. Several of the cases commonly cited as cases of estoppel may reveal, when carefully examined, the presence of consideration for the promise.[52]

In *Combe* v. *Combe* [53] a husband, between the dates of decree nisi and decree absolute, promised to pay to his wife £100 p.a. free of tax. In reliance upon this promise, but not in consideration of it, the wife forbore to apply to the court for maintenance. The payments were not made. The wife failed in her action to recover them. There was no contract.[54] The wife's reliance upon the husband's promise could not provide a new cause of action.

The principle of the *High Trees* case, said Denning L.J., "does not create new causes of action where none existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the

50 *Robertson* v. *Minister of Pensions* [1949] 1 K.B. 227; *Ajayi* v. *R. T. Briscoe (Nigeria) Ltd.* [1964] 1 W.L.R. 1326 at p. 1330.

51 *Supra*, at p. 1330.

52 *Re William Porter* [1937] 2 All E.R. 361; *Ledingham* v. *Bermejo Estancia Co.* [1947] 1 All E.R. 749; (1951) 67 L.Q.R. 330 at p. 331 (J. F. Wilson).

53 [1951] 2 K.B. 215; *P.* v. *P.* [1957] N.Z.L.R. 854.

54 Such a contract would not in any case have been binding: *Hyman* v. *Hyman* [1929] A.C. 601; *Gaisberg* v. *Storr* [1950] 1 K.B. 107.

dealings which have taken place between the parties. . . it can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind." [55]

C. The Scope of Promissory Estoppel

Most of the cases so far discussed have been concerned with the waiver or discharge of contractual rights. Some of the formulations of the doctrine of promissory estoppel so define it.[56] It is submitted, that, although this is the area in which the doctrine will most commonly be applied, there is no reason or authority for so restricting it.

Another area in which the doctrine has been held applicable, and where it has much potential scope, is that of licences.[57] It can apply where an occupier is given permission by a neighbour to do something on his land which would otherwise be a nuisance to a neighbour,[58] and also where a licensor allows a licensee to enter his land, and the licensee acts to his detriment in reliance upon a gratuitous promise. For example, A encourages B to erect a building on A's land, gratuitously promising that B will be allowed to occupy it; B does so, and A sues him in trespass and ejectment. This is a clear case for the court to intervene to prevent injustice to B. An estoppel has been held to arise in these cases. As with the cases dealing with waiver and discharge of contractual rights, the existence of promissory estoppel has only been identified in recent cases on licences.[59] Previously, a wide variety of solutions had been reached for which there is difficulty in finding theoretical justification. The matter is, however, more particularly relevant to the subject of licences, and is discussed in the next chapter.

[55] [1951] 2 K.B. 215 at pp. 219–220.
[56] Lord Hodson in *Ajayi* v. *R. T. Briscoe (Nigeria) Ltd.* [1964] 1 W.L.R. 1326 at p. 1330, *ante*, p. 670; (1951) 67 L.Q.R. 330 at p. 341 (J. F. Wilson); *per* Harman J. in *City and Westminster Properties (1934) Ltd.* v. *Mudd* [1959] Ch. 129 at p. 145.
[57] *Post*, p. 679.
[58] *Liggins* v. *Inge* (1831) 7 Bing. 682.
[59] See Lord Denning M.R. in *Inwards* v. *Baker* [1965] 2 Q.B. 29 at pp. 36, 37; Tiley, p. 71.

CHAPTER 35

LICENCES

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1. GENERAL [1]

A LICENCE is a permission. We are here concerned with licences, or permissions, to enter upon land.[2] The licence makes lawful what would otherwise be a trespass.[3] Much of the early material is more relevant to a discussion of common law real property than of modern equity. The situation at common law will only be sketched in outline, so as to show the problems which baffled the common law, and to allow a discussion in more detail of the assistance given by equity to their solution. The basic question for consideration is the extent to which the licensee has the right to enjoy his licence; or, looked at from the other side, to what extent the licensor may revoke it and eject him. Once this question is decided in favour of the irrevocability of the licence, a further question inevitably arises: If the licence is enforceable against the licensor, is it enforceable also against a third party to whom the land may be conveyed?

2. THE SITUATION AT COMMON LAW

The common law never reached a satisfactory solution to the problem of the protection of the licensee. A few propositions, relating to particular types of licences, were, however, established.

1 [1954] C.L.J. 201; [1955] C.L.J. 47 (H. G. Hanbury).
2 A licence, however, may be a permission to a neighbour for the neighbour to do on his own land something which would otherwise be a wrong to the licensor, and the same general principles apply; *Winter* v. *Brockwell* (1807) 8 East 308; *Liggins* v. *Inge* (1831) 7 Bing. 682.
3 *Thomas* v. *Sorrell* (1673) Vaug. 330 at p. 351.

A. A Bare or Gratuitous Licence is Revocable at the Will of the Licensor

A simple permission to enter the licensor's land gives no contractual or proprietary right to the licensee. The permission may be withdrawn at any time by the licensor. On revocation, the licensee becomes a trespasser, but is allowed a reasonable time to collect his goods and perhaps to finish his business and to leave the land.[4]

B. A Licence Coupled with a Grant (or an Interest) is Irrevocable

It has long been established that a licence coupled with a grant of proprietary interest is irrevocable.[5] The interest may be an iterest in personalty or in land. The concept of a licence coupled with a grant is clearly seen where the grant is of a chattel interest; where for example an occupier sells a stack of coal on his land to a purchaser,[6] or some cut timber,[7] and expressly or by implication gives the purchaser permission to enter the land to collect it. Such a licence is irrevocable.[8] It is however artificial to speak of a licence coupled with a proprietary interest in land: for if the proprietary interest entitles the grantee to enter (as with a lease or an easement) the grantee enters by force of the grant and not under any licence.

The interest must of course be properly granted. Property is granted in chattels by gift or sale. With realty, a deed is required at law[9]; but a contract for valuable consideration to grant the interest is an effective grant in equity.[10]

C. Contractual Licences

Most of the difficulties which arose at common law were concerned with contractual licences. If the licensor (A) contracted for valuable consideration to allow the licensee (B) to enter his land for a particular purpose or for a particular period of time, and A, in breach of contract, ordered B to leave, and, perhaps, forcibly ejected him, what are B's rights?

> In *Wood* v. *Leadbitter*,[11] the plaintiff purchased a ticket of admission to the grandstand at Doncaster Racecourse. The

[4] *Minister of Health* v. *Bellotti* [1944] K.B. 298; *Canadian Pacific Rail Co.* v. *R.* [1931] A.C. 414; *Winter Garden Theatre (London) Ltd.* v. *Millennium Productions Ltd.* [1948] A.C. 173 at p. 199; *Australian Blue Metal Co.* v. *Hughes* (1963] A.C. 74.

[5] *Webb* v. *Paternoster* (1619) Palm. 71; *Wood* v. *Manley* (1839) 11 A. & E. 34; *James Jones & Son Ltd.* v. *Tankerville* [1909] 2 Ch. 440.

[6] *Wood* v. *Manley* (1839) 11 A. & E. 34.

[7] *James Jones & Son Ltd.* v. *Tankerville*, *supra*.

[8] Note 5, *supra*.

[9] L.P.A. 1925, s. 52.

[10] *Ante*, p. 499.

[11] (1845) 13 M. & W. 838.

defendant, on the orders of the steward of the course, required him to leave. He refused to go, and was physically removed, no more force being used than was reasonably necessary. He sued for assault and false imprisonment, and failed. The Court of Exchequer distinguished between a mere licence, such as this, which was revocable; and a licence coupled with an interest, which was not.

In the circumstances nothing was *granted* to the plaintiff. The fact that valuable consideration had been given made no difference; an action for breach of contract no doubt lay [12] but was not raised by the form of action in which this case was fought. Whether or not the defendant had the *right*, under the terms of the contract, to eject the plaintiff, he had a *power* to do so.[13]

Attempts were made in some cases to give some protection to a licensee who had no grant by the application of a rule that, if the licensee had entered upon the licence, it was irrevocable. This theory conflicts with cases where licensees have been evicted after entry, and seems not to have survived *Wood* v. *Leadbitter*,[14] where *Tayler* v. *Waters*,[15] the leading case in support of this view, was described as being " to the last degree unsatisfactory." [16] It is, however, sometimes still supported.[17]

The conclusion must be that until the Judicature Act 1875, the common law provided no adequate doctrine to deal with the problem of contractual licences.

3. The Intervention of Equity

A. Contractual Licences

In *Hurst* v. *Picture Theatres Ltd.*,[18] the plaintiff paid to watch a cinema show in the defendants' theatre. The defendants mistakenly thought that he had entered without paying. On being requested to leave, he refused and was ejected. He sued for assault and false imprisonment and succeeded.

12 *Per* Viscount Simon L.C. in *Winter Garden Theatre (London) Ltd.* v. *Millennium Productions Ltd.* [1948] A.C. 173 at p. 190.
13 *Per* Goddard L.J. in *Thompson* v. *Park* [1944] K.B. 408 at p. 410.
14 (1845) 13 M. & W. 838.
15 (1816) 7 Taunt. 374.
16 (1845) 13 M. & W. 838 at p. 852.
17 (1965) 29 Conv.(N.S.) 19 (M. C. Cullity); *cf. Liggins* v. *Inge* (1831) 7 Bing. 682 dealing with a permission to the defendant to do something on his land which caused a nuisance to the plaintiff's land.
18 [1915] 1 K.B. 1.

Buckley L.J. gave two grounds for distinguishing the case from *Wood* v. *Leadbitter*,[19] both based upon the availability of equitable doctrine, the first reason being, it is submitted, clearly wrong, and the second being the basis of the modern doctrine protecting contractual licensees. The first ground was that the plaintiff had a licence coupled with an interest—" the right to see "—and that the interest can now be granted in equity by a contract, whereas before 1875 a deed was required. The fallacy in this reasoning is that there was no identifiable proprietary interest to be granted.[20] A " right to see " is not a piece of property; deed or no deed, nothing in the circumstances would have been granted because there was no proprietary interest to grant.

As a second ground for the decision, Buckley L.J. treated the matter as one of construing the parties' rights under the contract. Here " there was included in that contract a contract not to revoke the licence until the play had run to its termination." [21] This is the germ of the later development; and the significance of the Judicature Act in this context is that it makes available the equitable remedy of an injunction to restrain the breach of contract by the licensor. This precludes the argument that he has no right to revoke, but has a power to do so; he has no power if an injunction is available to restrain him.

Winter Garden Theatre (London) Ltd. v. *Millennium Productions Ltd.*[22] finally established that the rights of the parties must be determined upon the proper construction of the contract.

> The respondents were given by contract the right to present plays at a theatre for a period of six months from July 6, 1942, with provision for an extension, which was agreed, for an unstated period, terminable by the respondents (the licensees) at a month's notice. No provision was made for termination by the licensors. In September 1945, the licensors, wishing to terminate, served notice accordingly. The House of Lords held that, on the proper construction of the contract, the licence was terminable on the giving of notice, the length of which must be reasonable in the circumstances. A licence is prima facie revocable.[23]

[19] (1845) 13 M. & W. 838.
[20] These matters are demonstrated by Phillimore L.J. in his dissenting judgment; *cf. Cowell* v. *Rosehill Racecourse* (1937) 56 C.L.R. 605; Tiley, p. 16.
[21] *Hurst* v. *Picture Theatres Ltd.* [1915] 1 K.B. 1 at p. 10; see also Kennedy L.J. at p. 14.
[22] [1948] A.C. 173; a successor in title has been held to be able to revoke on giving reasonable notice; *Re Spenborough Urban District Council's Agreement* [1968] Ch. 139.
[23] *Winter Garden Theatre (London) Ltd.* v. *Millennium Productions Ltd.* [1948] A.C. 173, *per* Lord Porter at p. 195.

The problem of *Hurst's* [24] case did not therefore arise. The Court of Appeal,[25] however, had construed the licence as irrevocable by the licensor, and decided that the licensee, in such a situation, would be protected by granting an injunction to restrain the breach of contract by the licensor.

Two further questions follow from the adoption of this theory. (1) It has been said that the right to an injunction will not protect the licensee unless a judge is present at the performance [26]; for he will otherwise be ejected before the injunction will issue. There is, however, no difficulty. The issue in these cases is whether the licensor, by effectively revoking, can make the licensee a trespasser. He can only do that by establishing in court that he has revoked. A court applying law and equity will not accept such a proposition if the circumstances are such that an injunction would have issued to restrain him from doing so. Thus the licensee does not become a trespasser and has an action in tort for assault.

(2) An injunction, like all equitable remedies, is discretionary. An injunction will not therefore be available to a licensee who is himself in breach of the terms of the licence. A licensee who himself misbehaves will not be protected.[27] Further, an injunction will not be granted where it will have the effect of compelling persons to live together in circumstances which are intolerable. If this situation arises in the case of a licence, an injunction may be refused, and the parties may be left to their rights at common law to sue for breach of contract.

> In *Thompson* v. *Park*,[28] an arrangement between two preparatory schoolmasters provided that some places should be reserved for the duration of the war for the defendant's pupils at the plaintiff's school. After various disagreements, the defendant (the licensee) was ordered to leave. He refused; and eventually the plaintiff wrote to the parents of the defendant's boys stating that they would not be able to return in the following term. The defendant then assembled a number of friends and supporters, entered the school, forced several locks, disconnected a pump and left the school without water; in Goddard L.J.'s words, he was "on his own showing . . . guilty at least of riot, affray, wilful damage, forcible entry, and, perhaps, conspiracy." [29]

[24] [1915] 1 K.B. 1.
[25] [1946] 1 All E.R. 678 at p. 684 *et seq.*
[26] See (1915) 31 L.Q.R. 217 at p. 221 (Sir John Miles); and Sir Wilfrid Greene M.R. in *Millennium Productions Ltd.* v. *Winter Garden Theatre (London) Ltd.* [1946] 1 All E.R. 678 at p. 685.
[27] *Thompson* v. *Park* [1944] K.B. 408.
[28] [1944] K.B. 408.
[29] *Ibid.* at p. 409.

In the circumstances, it is not surprising that the plaintiff obtained an interim injunction to restrain a breach of the peace. The defendant was so obviously in breach of his own obligations under the contract that there could be no question of his obtaining an injunction against the plaintiff to restrain a breach of the contract.

An interesting situation would, however, have arisen on these facts if the defendant (the licensee) had behaved impeccably. The first question then would have been whether, on its proper construction, the licence was revocable by the licensor on giving reasonable notice. If it was held revocable, he could so revoke. But if the court had held that, as the licence was given for a specific period of time, it was irrevocable, the court would be faced with the question whether or not to issue an injunction. Such a remedy would compel the continuation of a situation which was already proved to be impossible; the court would be likely to leave the parties to their remedy at law.

These remedies will include an action for breach of contract.[30] Apart from this, the *Wood* v. *Leadbitter*[31] situation may, in the absence of assistance from equity, return. On the other hand, it is submitted that the common law could conclude that the licensee, being the innocent party to the breach, could decide, on ordinary principles of contract law, either to accept the breach and sue or to hold the other party to his performance as far as possible. This line of argument would lead to a stalemate; and it may well be best, if the circumstances are not suitable for an injunction, to accept the revocation, and to leave the licensee to his remedy in damages.

B. Estoppel

i. The Protection of the Licensee. A long line of cases[32] has established that where a licensee has been permitted or encouraged by the licensor to act in such a way that an estoppel arises in his favour, the licensor will be bound by it and will be unable to eject

[30] *Kerrison* v. *Smith* [1897] 2 Q.B. 445.

[31] (1845) 13 M. & W. 838.

[32] *East India Co.* v. *Vincent* (1740) 2 Atk. 83; *Dann* v. *Spurrier* (1802) 7 Ves.Jr. 231; *Duke of Devonshire* v. *Eglin* (1851) 14 Beav. 530; *Duke of Beaufort* v. *Patrick* (1853) 17 Beav. 60; *Unity Joint Stock Mutual Banking Association* v. *King* (1858) 25 Beav. 72; *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129; *Wilmott* v. *Barber* (1880) 15 Ch.D. 96; Tiley, p. 69; *Plimmer* v. *Wellington Corporation* (1884) 9 App.Cas. 699; *Foster* v. *Robinson* [1951] 1 K.B. 149; *Errington* v. *Errington and Woods* [1952] 1 K.B. 290; *Vaughan* v. *Vaughan* [1953] 1 Q.B. 762; *Hopgood* v. *Brown* [1955] 1 W.L.R. 213; (1956) 20 Conv.(N.S.) 291 (R. H. Maudsley); *Armstrong* v. *Sheppard and Short* [1959] 2 Q.B. 384; *Inwards* v. *Baker* [1965] 2 Q.B. 29; Tiley, p. 71; (1965) 81 L.Q.R. 183 (R. H. Maudsley); *Ward* v. *Kirkland* [1967] Ch. 194; *E. R. Ives (Investment) Ltd.* v. *High* [1967] 2 Q.B. 379; Tiley, p. 75; Snell, p. 629 *et seq.*; (1967) 31 Conv.(N.S.) 338 (F. R. Crane).

the licensee inconsistently with the representation which forms the basis of estoppel. "If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land, with the consent of the landlord and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation."[33] For example, if A encourages B to build a home on A's land under the express or implied undertaking that B will be allowed to occupy the house for a period of time, A cannot eject B as soon as the house is built[34]; or if A persuades B to surrender a protected tenancy on the understanding that B may live in the house rent-free for the remainder of his life, A cannot inconsistently eject B.[35] The representation may be by words, conduct or by silence; it need not be a representation of fact.

ii. Contract and Estoppel. It may be that such a situation arises in circumstances in which there is also an arrangement between the parties creating a contractual licence.[35] In such circumstances, the licensee may rely either on the contract or on the estoppel. The contractual basis will be essential if he is suing for damages. But if it is correct to say, as is submitted below, that licensees by estoppel are protected against third parties taking with notice, but contractual licensees are not, the protection based on estoppel will be essential if the licensor has transferred the property to a third party.

iii. The Remedies Available. It has been said on more than one occasion that "it is for the court in each case to decide in what way the equity can be satisfied."[36] The reports show a wide variety of solutions reached in cases in which a person has expended money on the property of another. Before looking at some of these, two points should be made. First, that the basis on which the court has granted relief has varied widely. Sometimes the plaintiff had acted under a mistake, and sometimes he had purchased for consideration, and sometimes he was treated as if he were a party to a contract. Secondly, it is only in the modern cases that these situations have been analysed

[33] *Per* Lord Kingsdown (dissenting) in *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129 at p. 170.

[34] *Dillwyn* v. *Llewelyn* (1862) 4 De G.F. & J. 517; *Inwards* v. *Baker* [1965] 2 Q.B. 29; Tiley, p. 71.

[35] *Foster* v. *Robinson* [1951] 1 K.B. 149.

[36] Lord Denning M.R. in *E. R. Ives (Investment) Ltd.* v. *High* [1967] 2 Q.B. 379 at p. 395; Tiley, p. 75; *Inwards* v. *Baker* [1965] 2 Q.B. 29 at p. 37; Tiley, p. 71; *Plimmer* v. *Wellington Corporation* (1884) 9 App.Cas. 699 at p. 714.

as cases of estoppel. It seems that the courts, without surrendering their freedom of action in these cases, are now less willing to order a conveyance where the plaintiff's only claim is based on estoppel.

A conveyance has been ordered where a person who was not owner at law purported to grant a legal lease, and subsequently became entitled to the legal fee simple [37]; or where the grantor of a lease was a mere tenant for life and the remainderman received the rent for six years but delayed until then his claim for possession [38]; or where money was expended under a mistaken belief (to the knowledge of the owner) that the plaintiff was entitled to the land [39]; or where the court was able to construe the expenditure in reliance upon a void conveyance as consideration for a promise to convey.[40]

Where the licensee relies, however, on nothing more than circumstances giving rise to estoppel, the court, according to the basic principle stated above, endeavours to reach a solution which meets the justice of the case. If the prejudice suffered by the licensee has been fully satisfied, he will obtain no further relief.[41] Otherwise he may be allowed to remain on the land as long as he wishes or for his life [42]; or he may be entitled to enjoy the licence indefinitely.[43] Or the court may decide that the equity is satisfied in other ways, as by awarding monetary compensation, or a lien on the property [44]; or by giving the licensee the right to remain on the land subject to payment of its value [45]; or of receiving compensation for the building erected or the improvement made [46]; or perhaps by giving the licensee the choice.

Some of these solutions are more extreme than would usually be appropriate to an estoppel licence. It is difficult, however, to see how estoppel can justify a decree ordering a conveyance as was done in *Dillwyn* v. *Llewelyn.*[47]

> A father encouraged his son to build a house on the father's land and signed a memorandum purporting to convey the land to the son. In reliance upon the father's undertaking the son spent a large sum of money in building the house. On the

[37] See M. & W., p. 652.
[38] *Stiles* v. *Cowper* (1748) 3 Atk. 692.
[39] *East India Co.* v *Vincent* (1740) 2 Atk. 83.
[40] *Dillwyn* v. *Llewelyn* (1862) 4 De G.F. & J. 517.
[41] *Att.-Gen.* v. *Balliol College Oxford* (1744) 9 Mod. 407 at p. 412.
[42] *Inwards* v. *Baker* [1965] 2 Q.B. 29; Tiley, p. 71.
[43] *Plimmer* v. *Wellington Corporation* (1884) 9 App.Cas. 699; *Cullen* v. *Cullen* [1962] I.R. 268; *Ward* v. *Kirkland* [1967] Ch. 194.
[44] *Unity Joint Stock Banking Association* v. *King* (1858) 25 Beav. 72; *Chalmers* v. *Pardoe* [1963] 1 W.L.R. 677.
[45] *Duke of Beaufort* v. *Patrick* (1853) 17 Beav. 60.
[46] See *Raffaele* v. *Raffaele* [1962] W.A.R. 238; (1963) 79 L.Q.R. 238 (D. E. Allan).
[47] (1862) 4 De G.F. & J. 517; *Bannister* v. *Bannister* [1948] 2 All E.R. 133; *Chalmers* v. *Pardoe* [1963] 1 W.L.R. 677; *Thomas* v. *Thomas* [1956] N.Z.L.R. 785.

father's death, his estate was ordered to convey the land to the son.

It is submitted that such a result should not be reached in a case based upon estoppel.[48] First, estoppel, as has been seen, is a shield and not a sword.[49] Secondly, such a solution is equivalent to an award of specific performance which never issues in favour of a volunteer.[50] Thirdly, it is long established that there is no equity to perfect an imperfect gift.[51]

Fourthly, the solution creates as many difficulties as it solves; for while it is hard on the son to have expended money on building a house on land belonging to another, it is equally hard on the other (or his estate) to be compelled to convey the land gratuitously. Let the value of the land be greater than the value of the house, and the point is clearly made. A solution which says either that the licensee has nothing or that he has everything is clumsy and unsuitable. It is submitted therefore that the correct solution to these cases is to protect the licensee against interference so long as he would be prejudiced thereby. This, indeed, was done in *Inwards* v. *Baker*[52] on facts very similar to *Dillwyn* v. *Llewelyn*[53]: the son was protected in his occupation and could remain there "as long as he desires to as his home."[54] In *Ward* v. *Kirkland*[55] Ungoed-Thomas J. granted an injunction to restrain interference with the exercise of a right of way in preference to granting an easement, and in *E. R. Ives (Investment) Ltd.* v. *High*[56] a right of way, exercised in circumstances giving rise to an estoppel, was held not to be an easement at law or in equity but enforceable, without registration, against a purchaser with notice.

A situation may of course be reached in which this negative protection is not adequate; a final solution of the parties' rights according to the justice of the case may be needed. In these circumstances the court's wide discretion may be most satisfactorily exercised by awarding compensation for the value of the improvements

[48] The court found that the expenditure supplied the consideration required to support a contract to convey the land. *Ante*, p. 681.

[49] *Ante*, p. 672, *Low* v. *Bouverie* [1891] 3 Ch. 82; *Combe* v. *Combe* [1951] 2 K.B. 215; *contra* (1965) 81 L.Q.R. 84 (D. C. Jackson). See also *Chalmers* v. *Pardoe*, *supra*; (1968) 32 Conv.(N.S.) 96 (R. E. Poole).

[50] *Ante*, p. 44; *Cannon* v. *Hartley* [1949] Ch. 213. In *Stiles* v. *Cowper* (1748) 3 Atk. 692 and *Ramsden* v. *Dyson*, *supra*, the party making the claim to a lease had given consideration.

[51] *Ante*, pp. 133, 140.

[52] [1965] 2 Q.B. 29; Tiley, p. 71.

[53] (1862) 4 De G.F. & J. 517.

[54] [1965] 2 Q.B. 29 at p. 37.

[55] [1967] Ch. 194.

[56] [1967] 2 Q.B. 379; *post*, p. 687.

to the land, or by ordering a conveyance subject to payment of the site value, or by giving a party the choice of remedy. In short, but at the risk of repetition, the court must in each case "decide in what way the equity can be satisfied." [57]

4. Deserted Wives

This section is inserted for the purpose of explaining why the situation of a deserted wife in a matrimonial home was once a leading feature in the law of licences but is no longer any part of it. The subject also forms a convenient transition from the discussion of the question of the protection of the licensee against the licensor to that of his protection against third parties.

When a husband has deserted his wife in the matrimonial home, the question whether he could evict her and recover the property was a "question between husband and wife as to the title to or possession of property" within Married Women's Property Act 1882, s. 17; the matter must be determined by application to the court, and the judge may "make such order with respect to the property in dispute . . . as he thinks fit." The general rule was that the husband could not evict his wife.[58] It is possible that the situation is affected by the Law Reform (Husband and Wife) Act 1962 which allows spouses to sue each other in tort.[59] It is unlikely, however, that such provision will be used in this context, for, by section 1 (2), the court may stay an action under the Act if the question can "more conveniently be disposed of on an application made under" the Married Women's Property Act 1882, s. 17.

No great problems arose in relation to attempts by the husband to evict his wife. Great difficulties arose, however, when the husband was the owner of the house, and he sold it to a third party. Should the wife be protected also against him? This general question reached the House of Lords in *National Provincial Bank Ltd.* v. *Ainsworth* [60] where the House decided that the wife's right to protection, whatever it may be, was not a licence. The matter is now dealt with by the Matrimonial Homes Act 1967 [61] under which a spouse without

[57] *Ibid.* at p. 395; *ante*, p. 680.

[58] *Bramwell* v. *Bramwell* [1942] 1 K.B. 370; *Stewart* v. *Stewart* [1948] 1 K.B. 507 at p. 513; *Lee* v. *Lee* [1952] 2 Q.B. 489n.

[59] (1964) 80 L.Q.R. 31 (R. E. Megarry).

[60] [1965] A.C. 1175.

[61] Matrimonial Homes Act 1967, s. 2. The land charge is a new category, Class F, "A charge affecting any land by virtue of the Matrimonial Homes Act 1967." Such rights, if not registered, are void against a purchaser of the land or any interest therein (L.C.A. 1925, s. 13 (2); Matrimonial Homes Act 1967, Sched.). They are thus void, unless registered, against an equitable mortgagee; see *Westminster Bank* v. *Lee* [1956] Ch. 7; (1968) 32 Conv.(N.S.) 85 (F. R. Crane).

any proprietary interest is given certain rights of occupation, which are registrable under the Land Charges Act 1925.

5. Licensees and Third Parties

The next question for consideration is whether a licensee who is protected against a licensor will be protected also against an assignee from the licensor. Again the different types of licence must be considered in turn. The position of the deserted wife, however, is no longer relevant to this context. It is necessary also to point out that principles applicable to the binding effect of equities and equitable interests differ between unregistered and registered land. Unless otherwise stated, the present account deals with unregistered land.

A. Licences Coupled with an Interest

The question here is whether or not the proprietary interest is binding on the third party. A legal interest in land or in a chattel will bind any third party. Where the interest is equitable only, as where there is a contract, not under seal, to grant an interest in land, or where title in a chattel has not yet passed, the interest, and with it the licence, will be binding on all persons other than a bona fide purchaser of a legal estate in the land for value without notice; registration, of course, constituting notice in the case of interests in land which are registrable under the Land Charges Act 1925.

B. Contractual Licences

It has been explained that a contractual licence [62] is not a form of grant. It is not specifically enforceable [63]; it is not any more valid for being granted under seal; it is assumed for the present that it is not registrable.[64] It is not a proprietary interest of any sort.

Generally speaking, contractual rights are not binding on third parties. It is possible, however, to produce a logical argument, following the wide view of the ratio of *Tulk* v. *Moxhay*,[65] to the effect that, since the licensee is protected against the licensor by an injunction, this right should be valid also against other parties coming to the land other than bona fide purchasers of the legal estate for value without notice. Although logical, the argument is not valid. The plaintiff's right to an injunction against A does not mean that he automatically has a right to an injunction against B; this is shown

62 Not being a licence coupled with an interest.
63 *Cf.* (1953) 16 M.L.R. 1 at p. 9 (G. C. Cheshire).
64 *Post*, p. 693.
65 (1848) 2 Ph. 774; *ante*, p. 600.

both by cases dealing with restrictive covenants affecting land [66] and chattels.[67] Whether or not an injunction lies against third parties is a policy decision which depends upon the circumstances of the case.

Is the contractual licence situation one in which an injunction should apply against third parties? It is submitted that the answer is in the negative, for two main reasons.

(a) If such licences were binding on third parties, an enormous number of new burdens on land would be created. A lodger's contractual licence, or an arrangement about parking a car, and a host of other contractual situations, would come on to the title; and many properties would become unsaleable. Nor would there be any corresponding interest which requires protection,[68] except that of the licensee himself which can be remedied by an award of damages.

(b) There is a very grave problem of determining whether or not a purchaser has constructive notice of the licensee's interest. Unless a contractual licence is registrable as an equitable easement,[69] there seems to be no practical solution. A contractual licensee is rarely in exclusive possession of the land [70]; a person who obtains exclusive possession in return for a consideration is usually a tenant. And where a licensee is not in possession, the rule that a purchaser has constructive notice of the interest of a person in possession cannot apply [71]; nor, in the case of registered land, could his interest be an overriding interest.[72] The licence will not appear in the deeds; and much uncertainty is inevitable if the decision on the question of notice depends on whether or not the purchaser ought in the circumstances to have known that there was a contractual licence.

Authority leads to the same conclusion.

> In *King* v. *David Allen and Sons, Billposting, Ltd.*,[73] the licensor agreed that the licensees should have the exclusive right of affixing advertisements upon a building. Later the licensor leased the building to a cinema company, no provision being made to protect the rights of the licensees. The licensees sued the licensor for breach of contract. The licensor was liable if the

[66] *Formby* v. *Barker* [1903] 2 Ch. 539; *London County Council* v. *Allen* [1914] 3 K.B. 642.

[67] *Taddy and Co.* v. *Sterious* [1904] 1 Ch. 354; *McGruther* v. *Pitcher* [1904] 2 Ch. 306; *Port Line* v. *Ben Line Steamers* [1958] 2 Q.B. 146; *ante*, p. 623; *Lord Strathcona SS. Co.* v. *Dominion Coal Co.* [1926] A.C. 108.

[68] As is required for the enforcement of a restrictive covenant; *ante*, p. 601.

[69] *Post*, p. 693.

[70] There are exceptional cases—*Foster* v. *Robinson* [1951] 1 K.B. 149.

[71] This is the rule in *Hunt* v. *Luck* [1902] 1 Ch. 428; *Barnhart* v. *Greenshields* (1853) 9 Moo.P.C. 18.

[72] L.R.A. 1925, s. 70 (1) (*g*).

[73] [1916] 2 A.C. 54; *Edwardes* v. *Barrington* (1901) 85 L.T. 650; *Warr (Frank) & Co. Ltd.* v. *L.C.C.* [1904] 1 K.B. 713; *Clore* v. *Theatrical Properties Ltd.* [1936] 3 All E.R. 483; *Re Solomon* [1967] Ch. 573 at p. 585.

lease to the company deprived the licensees of their contractual right. The House of Lords held that it did. The action succeeded.

So far as is known, there is no case in which a contractual licence has been held to be binding on a third party. *Errington* v. *Errington*[74] has sometimes been said to be such a case. It is submitted that this is not so; first, because there is no evidence in that case of an agreement to permit the licensees to remain in possession while the premiums were being paid; and, secondly, that, even if there were such a contractual licence, the situation was governed also by estoppel, which was of itself sufficient to protect the licensees against third parties. If *Errington* v. *Errington*[74] is accepted as a case of estoppel, the cases on licences affecting third parties fit comfortably into categories and reach conclusions which are consistent with principle and authority.

C. Licences by Estoppel[75]

The analysis of this situation is similar to that of a contractual licence. The licensee is protected against the licensor and can obtain an injunction to restrain the licensor from acting inconsistently with an earlier undertaking. Is the right valid against third parties?[76]

The policy considerations here are different. The licensee has already acted to his detriment; there is no remedy other than the equitable remedy of injunction which can be available; and it is common, in cases of this type, for the licensee to be in possession and for the issue of notice to the purchaser to be determined under the rule in *Hunt* v. *Luck*.[77]

The cases show progressively a willingness to enforce an estoppel against third parties.

In *Errington* v. *Errington*,[78] the father (A) of a young man who was about to be married purchased a house through a building society, made a down-payment and told the young couple that the house would be theirs when they had paid all the instalments due under the mortgage. They went into possession and paid all the instalments which fell due. Nothing was stated concerning the rights of the young couple during the currency of the mortgage payments. A died, leaving all his property to Mrs. A.

74 [1952] 1 K.B. 290; *infra*.
75 [1954] C.L.J. 201 and [1955] C.L.J. 47 (H. G. Hanbury); (1956) 20 Conv.(N.S.) 281 (R. H. Maudsley).
76 Not, of course, being purchasers of a legal estate for value without notice.
77 [1902] 1 Ch. 428; *ante*, p. 685.
78 [1952] 1 K.B. 290; *Duke of Beaufort* v. *Patrick* (1853) 17 Beav. 60; *Inwards* v. *Baker* [1965] 2 Q.B. 29; Tiley, p. 71.

The son returned to his mother, who took steps to evict the daughter-in-law. She failed. The daughter-in-law was held to be a licensee who was entitled to protection not only against A in his lifetime, but also against Mrs. A, taking as a volunteer.

The language does not make clear whether the licence was treated as a contractual licence or a licence by estoppel. There was clearly an estoppel, arising out of the payment of the mortgage premiums for some nine years, and it is submitted that it is this that entitled the daughter-in-law to protection against Mrs. A. When the final instalment had been paid, the daughter-in-law would become owner in equity by virtue of her right to specific performance of A's promise to convey the land to the couple after the instalments were all paid.

D. The Extent of the Protection

A licensee by estoppel has been protected against a purchaser with actual or with constructive notice.

In *E. R. Ives Investment Ltd.* v. *High*,[79] the defendant built a house on his land. His neighbour began to build a block of flats which encroached on the defendant's land. It was informally agreed that the encroachment should stay and that the defendant should have the right of access across the neighbour's yard; and, in reliance on this, the defendant built a garage in a position which was suitable only for this purpose.

The neighbour sold to X, who sold to the plaintiffs, expressly subject to the defendant's right of way. The right of way was not registered, nor, being oral only, was it properly granted at law. The Court of Appeal held that the defendant had a right by estoppel which, not being registrable as a Land Charge, Class D (iii), was binding on the plaintiffs.

In *Hopgood* v. *Brown* [80] the two adjoining plots of land A and B were owned respectively by the defendant and by a company of which the defendant was a director. The defendant with the agreement and assistance of the company built a garage adjoining what was believed to be the boundary of plot A, but which in fact overlapped plot B. The company sold to X, who sold to the plaintiff. The plaintiff was inconvenienced by the encroachment and claimed the land up to the proper boundary. He failed. The Court of Appeal held that the company would have been estopped from asserting that the boundary was otherwise than as agreed; and the plaintiff, having constructive notice,

[79] [1967] 2 Q.B. 379; Tiley, p. 75; *post*, p. 692.
[80] [1955] 1 W.L.R. 213.

from the deeds, of the correct location of the boundary, could be in no better position.

6. Further Questions

This branch of the law is still developing. It is not surprising that a number of questions remain unanswered.

A. The Requirements for Establishing an Estoppel

It seems that this is a branch of the doctrine of equitable estoppel or promissory estoppel, depending on whether the representation was one of fact or intention. In the present context, all cases have included a detriment to the party relying on the representation; it is not clear whether this is essential. Further, it has been held that no estoppel arises where the representator was unaware of his right to object to the activity which he encouraged or permitted.[81]

B. The Persons who are Bound

Third parties are bound by the estoppel, unless they are bona fide purchasers of a legal estate for value without notice. If the purchaser has express notice, no problems arise. But if he does not know, there are considerable difficulties in determining whether he has constructive notice. The estoppel is not registrable.[82] If the licensee is in possession of the land, the question of notice can be determined in a reasonably satisfactory manner by applying the rule in *Hunt* v. *Luck*[83]; or by treating the estoppel as an overriding interest in the case of registered land.[84] In other cases, there is little guidance beyond applying a general test whether or not the purchaser ought to have known of the situation giving rise to the estoppel.

C. Can the Benefit be Assigned?

There is little guidance on the question whether or not the benefit of a licence by estoppel may be assigned. On principle, the protection given by estoppel should be negative only; it should merely protect a victim from the detriment he suffered; it should not provide him with something he can sell.

[81] *Armstrong* v. *Sheppard and Short Ltd.* [1959] 2 Q.B. 384. It is not clear however that this limitation produced the most satisfactory answer to this case; Maudsley and Burn, pp. 286–287; *Ward* v. *Kirkland* [1967] Ch. 194 at p. 240.

[82] *E. R. Ives Investment Ltd.* v. *High* [1967] 2 Q.B. 379 at p. 395; Tiley, p. 75; *post*, p. 693.

[83] [1902] 1 Ch. 428.

[84] L.R.A. 1925, s. 70 (1) (*g*).

Such a view may, however, be unrealistic in such a situation. In *Hopgood* v. *Brown*,[85] for example, the defendant was protected in his occupation of a small strip of the plaintiff's land. He will wish to pass the benefit to a purchaser; and may be said to be inadequately protected unless he can do so. In that case, the offending building was only a garage; the point would be made more forcibly if, as in *E. R. Ives Investment Ltd.* v. *High*,[86] it was the foundation of a main structure.

It has been seen that in some cases the licensee has obtained a conveyance of property.[87] Assuming, however, that the situation is one in which the benefit obtained is something less than an interest in land, the question of the transfer of the benefit of the licence is a specialised question which must be worked out in its own context. "The rules regarding annexation of the benefit of easements and restrictive covenants may indicate possible lines of development."[88]

D. Conveyancing Difficulties

It is clear that the recognition of rights of the type discussed in this section will create additional conveyancing problems. The rights are neither registrable nor overreachable. A purchaser with constructive notice will be bound. The importance of inspection of the premises is greatly increased: "the task is not dissimilar to that imposed by the possible existence of legal easements or *profits à prendre*, or prescriptive enjoyment of an inchoate right."[89] The question is whether these difficulties are a proper price to pay for the advantages gained.

[85] [1955] 1 W.L.R. 213.
[86] [1967] 2 Q.B. 379; Tiley, p. 75.
[87] *Ante*, p. 681.
[88] (1967) 31 Conv.(N.S.) 341 (F. R. Crane).
[89] *Ibid.* 341 (F. R. Crane).

CHAPTER 36

EQUITABLE EASEMENTS

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1. ENFORCEMENT GENERALLY OF RIGHTS AGAINST THIRD PARTIES

THE question of the enforceability against third parties of rights affecting land can arise in many contexts. And if such a right is enforceable in equity against a third party, not being a bona fide purchaser of a legal estate for value without notice, the question arises as to the way in which the question of notice will be determined. Basically there are three possibilities: first, that the pre-1926 rules will apply, as with restrictive covenants entered into before January 1, 1926, or with licences; secondly, that the right is registrable; and, thirdly, that, in the case of registered land, a purchaser is bound by an unregistered interest if it is an "overriding interest" within the Land Registration Act 1925, s. 70 (1); otherwise not.[1]

With unregistered land, the system of registration of land charges introduced in 1926 has been explained.[2] Certain types of rights are expressly made registrable: such as restrictive covenants, estate contracts, mortgages (legal or equitable) of a legal estate, not being mortgages protected by deposit of title deeds. Other types of equitable interests, such as beneficial interests under trusts for sale or strict settlements, are not made registrable because they are overreached on a sale. Certain other interests are binding on a purchaser although not registered, such as legal easements and leases, and mortgages protected by deposit of title deeds. The purchaser will find out about such mortgage because the mortgagor has no deeds.[3] He must, however, take special care over leases and easements. Their existence may be disclosed from the deeds, but a purchaser should, by examination of the land, ascertain whether the vendor or a lessee is

[1] See *per* Cross J. in *Poster* v. *Slough Estates* [1968] 1 W.L.R. 1515 at p. 1521.
[2] *Ante*, p. 25.
[3] Unless by mistake, fraud or misrepresentation, the deeds have returned to his possession; *ante*, p. 575 *et seq.*

in possession; and he will often, by inspection, be able to find sufficient evidence of an easement to enable him at least to raise a requisition. The point here, however, is that, with certain such interests, although they may be non-registrable and non-overreachable interests, the purchaser takes subject to them. Those interests, as will be seen, are almost exclusively *legal*; the only such equitable interest is an equitable mortgage which is protected by deposit of the title deeds.

2. Special Problems Relating to Equitable Easements

The problem of determining whether or not equitable rights affecting land (such as licences) are binding on third parties is aggravated by the fact that "equitable easements" are not adequately defined. We are thus left with the problem which we met in discussing licences, of the necessity of determining whether a right is capable of affecting third parties; and then of deciding how to determine whether or not a purchaser has notice of it. While it is tempting to simplify the issue of notice by leaning in favour of a construction which makes a right registrable, this can create further problems. Registration is notice to all the world [4]; but failure to register a registrable interest makes it void against a purchaser,[5] even if he actually knows of it.[6] Many of the rights under consideration (such as licences) are informal arrangements reached without the assistance of professional advice and in ignorance, therefore, of the statutory provisions concerning registration. To make such rights registrable may therefore play into the hands of the unscrupulous well-informed at the expense of the innocent ignorant.

3. Definition

An equitable easement is defined as "any easement, liberty, or privilege over or affecting land and being merely an equitable interest." [7]

There are, broadly speaking, two views on the construction of this definition. First, the narrower view [8] that it includes only interests in equity which correspond to interests which could have existed before

[4] L.P.A. 1925, s. 198 (1).

[5] L.C.A. 1925, s. 13 (2). As respects a land charge Class D on an estate contract, the land charge is void only in favour of a purchaser for money or money's worth. This includes an equitable easement (Class D (iii)).

[6] *Hollington Bros.* v. *Rhodes* [1951] 2 T.L.R. 691.

[7] L.P.A. 1925, s. 2 (3) (iii); the definition in L.C.A. 1925, s. 10 (1) Class D (iii) substitutes the word "right" for "liberty." So far as is known there is no significance in this variation.

[8] (1937) 53 L.Q.R. 259 (C. V. Davidge); (1963) 27 Conv.(N.S.) 30 at p. 33 (A. G. Guest and J. F. Lever).

1926 at law. Examples are an easement or profit granted informally (though these are registrable also as estate contracts) [9]; and an easement or profit for the life of the grantee [10] or for an indefinite period. Secondly, the wider view that a large number of informal rights given to a person and affecting land, enforceable in equity and not being legal interests, are included. It is submitted that the first, or narrower, view is correct.

4. Reasons for Preferring Narrower Construction

A. Equitable Interests

The definition, in its widest interpretation, includes only such rights as are equitable *interests*; and this itself gives rise to difficulties. The Law of Property Act 1925, s. 4, provides that "after the commencement of this Act . . . an equitable interest in land shall only be capable of being validly created in any case in which an equivalent equitable interest in property . . . could have been validly created before such commencement." The vague and wide definition of "equitable easement" is thus no permission to invent a host of new equitable interests. It seems clear also that an "interest" must be something of a proprietary nature, something which can be assigned. It is necessary, but not sufficient, that it is enforceable against third parties. Thus a licence by estoppel is not registrable.[11] A contractual licence is not an equitable interest, for it is not binding on third parties, notice or no notice, but if the contract is more than a contractual licence and is a contract to convey or create a legal estate, it is registrable as an estate contract.

B. Ejusdem Generis Construction

The words "easement, liberty or privilege" have been held to be *ejusdem generis*. In *Lewisham Borough Council* v. *Maloney* [12] the question was whether a purchaser (with full knowledge) was bound by a requisition notice served by a local authority in respect of the land. The Court of Appeal held that the authority's rights under the requisition notice did not constitute an equitable easement, were not registrable and were not, therefore, void for lack of registration.

C. Dicta in Support of Narrower View

In *E. R. Ives (Investment) Ltd.* v. *High*,[13] the Court of Appeal held that an arrangement whereby a neighbour was allowed to cross a

[9] Class C (iv).
[10] (1935) 15 Bell Yard 18 (G. Cross); see also 12 Conv.(N.S.) 202 (J. F. Garner).
[11] *Ante*, p. 688.
[12] [1948] 1 K.B. 50.
[13] [1967] 2 Q.B. 379; *ante*, p. 687.

yard was not an equitable easement. It was enforceable against a purchaser with notice on the principle of estoppel. An estoppel is not registrable under the Land Charges Act 1925.[14] Equitable easements include only those equitable interests which before 1926 could have subsisted as legal estates.

This view was accepted by Cross J. in *Poster* v. *Slough Estates*,[15] pointing out, however, that it worked well with unregistered land " for the judge can apply the doctrine of notice to the unregistrable equities in question." [16] This, however, is not possible with registered land, where the purchaser is bound only by overriding interests; and by registrable interests if registered. The unsatisfactory situation is thus reached that, with unregistered land, the rights under discussion, being unlikely to be registered, will only be binding on a purchaser (even with knowledge) if they are held not to be registrable; with registered land, they will never be binding unless held to be registrable.

D. Rights Given under Seal

If a licence under seal were now held to be registrable as an equitable easement, the misunderstandings about the significance of a seal as regards the revocability of a licence, stemming from *Wood* v. *Leadbitter*,[17] would revive. It is established that contractual licences are not binding on third parties.[18] If the definition of " equitable easement " were held to include the giving under seal of a personal right to walk across land (or to attend a race meeting) the right, if registrable and registered, would be binding on third parties. A contractual licence, as has been seen, is not. It is important to avoid re-creating this distinction; and to appreciate that the document under seal, if it conveys no legal estate, conveys no property right, at law or in equity. At most its effect is to give rise to an action for damages. Third parties are therefore unconcerned; unless of course an estoppel situation arises.

5. The Need for Reform

It is no wonder that Cross J. in *Poster* v. *Slough Estates* [19] thought that the law relating to " ' equitable easements ' seemed to be a weak spot [in the modern law of real property] which might with advantage receive the attention of the Law Commission." The matter is

[14] *Ibid. per* Winn L.J. at p. 405.
[15] [1968] 1 W.L.R. 1515.
[16] *Ibid.* at p. 1521.
[17] (1845) 13 M. & W. 838.
[18] *King* v. *David Allen (Billposting) Ltd.* [1916] 2 A.C. 54; *ante*, p. 685.
[19] [1968] 1 W.L.R. at p. 1521.

important, for some 2,000 equitable easements were registered in 1954 [20]; it may well be that only a small proportion of them should have been registered and that many of them are not binding on third parties; the fact of registration, however, may be sufficient to create an impression of legal enforceability in the minds of third parties. The Committee on Land Charges recommended that Class D (iii) should be abolished.[21] In the meantime it is submitted that it should be restricted to the area where there is no doubt as to its application, such as easements or profits granted for a period other than for a fee simple or term of years, and (though this will overlap with estate contracts), easements and profits created by contract and not under seal.

[20] Report of Committee on Land Charges (1956) Cmnd. 9825, para. 9.
[21] *Ibid.*, para. 16.

CHAPTER 37

EQUITABLE INTERESTS AND EQUITIES: A PROBLEM OF PRIORITIES

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1. INTRODUCTION

THIS difficult question has been left until the end of the book, partly because it enables us to tie together certain aspects of equity which have hitherto been considered separately, and partly because the nature of the question can best be understood after the width of manner of equitable intervention has been appreciated.

It is necessary to appreciate the various uses of the phrase "equitable interests."

A. Equitable Interests in Land and Personalty

The property legislation of 1925 uses the phrase in the context of interests *in* land; thus the tenant for life of land has an equitable interest, namely, an equitable tenancy for life, *in* the land. All successive interests in land, other than leasehold estates, can now, as has been seen,[1] exist only in equity. But the terminology of "equitable interests" is also appropriate to personalty, and it is common usage to speak of such interests in relation, for example, to life interests in trust funds.[2] The phrase is not appropriate, however, to rights under a will in the course of being administered; here equity recognises in the beneficiaries only a right that the estate be properly administered.[3]

B. Equitable Interests over Land

The phrase also occurs in the context of rights *over* land. Some rights over the land of another have the characteristic that they can be made to benefit and burden land in the hands of successors in title

[1] *Ante*, p. 26.
[2] *e.g.*, L.P.A. 1925, s. 53 (1) (*c*), *ante*, p. 119; *Cave* v. *Cave* (1880) 15 Ch.D. 639. Contrast the position taken in Ireland: *Re ffrench's Estate* (1887) 21 L.R.Ir. 283; (1957) 21 Conv.(N.S.) 198–199 (V. T. H. Delany).
[3] *Ante*, p. 93.

to the creators of the rights. This is true of certain legal interests, such as easements and profits. It is also true of certain "equitable interests," such as restrictive covenants, equitable mortgages, vendors' liens and estate contracts.[4] The manner in which they can be made to bind land will of course vary with the equitable or legal interests in question. The doctrine of notice and the provisions of the Land Charges Act 1925 must also be borne in mind.[5]

Notice is not the *cause* of equitable interests being able to bind the land. A right does not become binding on third parties *because* the third party has notice or even because the right may have been registered. Notice or registration may be one essential factor in enabling the rights to be binding on third parties. The reason why they are so binding is that equity has decided to give this status to them. The characteristics which are influential in leading to this status are, according to a recent suggestion,[6] those of definability, identifiability and stability. These characteristics must be possessed by an "equitable interest" respecting the land of another if it is to bind the land in the hands of successors. The rights which so qualify are well known; and, though the courts have not closed the door to the possibility of new ones emerging,[7] a new right of this type is reluctantly admitted, especially if its admission would conflict with the principle of making use of the procedure of registration as the means of protecting interests over land. Hence the difficulties, already discussed, of determining whether a licence to occupy land can ever be binding on third parties.[8]

C. Personalty

Covenants affecting the use of personalty do not constitute "equitable interests" in the sense of binding the personalty in the hands of third parties; the fact that a purchaser of a chattel has notice of an undertaking in respect of the user of the chattel is not relevant so far as property law is concerned.[9] It is obvious therefore that care must be taken in the use of the phrase "equitable interest"; nothing in this section in any way affects the proposition that "equitable

[4] See (1955) 19 Conv.(N.S.) 343 (F. R. Crane) for a full discussion.

[5] In this section, we are not concerned with problems of competing interests which fall to be solved by reference to registration, *e.g.*, restrictive covenants since 1925.

[6] See particularly *National Provincial Bank Ltd.* v. *Ainsworth* [1965] A.C. 1175 at pp. 1247–1248 *per* Lord Wilberforce, and at p. 1237 *per* Lord Upjohn.

[7] See Lord Upjohn in *National Provincial Bank Ltd.* v. *Ainsworth*, *supra*, at p. 1239.

[8] See *ante*, p. 684 *et seq.*

[9] *Port Line Ltd.* v. *Ben Line Steamers Ltd.* [1958] 2 Q.B. 146; *ante*, p. 623; see (1966) 29 M.L.R. 657 (G. H. Treitel).

interests" in the first sense (discussed in Section A) are proprietary interests binding upon, and enforceable against, personalty subject to a trust.

D. Equities

It has been seen that equity has many other methods of intervention than those relevant to the enforcement of property rights within the category of "equitable *interests*." To all these various methods, the phrase "an equity" has been applied. Thus it is common to talk of the equities of specific performance, of estoppel, of rescission, of rectification, of undue influence, of consolidation of mortgages, and many others. It is obvious then that the phrase "an equity" is not a technical one, but a residual one, used where no more technical phrase is available. It is also obvious that equities do not share common characteristics capable of being elaborated.

2. The Bona Fide Purchaser of an Equitable Interest in Property Without Notice

It sometimes happens, however, that "equities" are treated as a group in order to solve certain questions of priorities. These questions of priorities occur in relation not only to land but also to personalty, though the policy issues in respect of land and personalty may well be very different. For, as has been shown,[10] a general distinction exists between the bona fide purchaser of a legal, and of an equitable, interest in property. The purchaser of a legal estate, if he has no notice of equitable interests, takes free of them. The purchaser of an equitable interest does not; he does, however, take free of equities,[11] if he has no notice of them. The theory behind this distinction is that dispositions of equitable interests in property are always "innocent"[12]; this curious description, which proceeds by way of contrast with "tortious" conveyances at law,[13] implies that only what can be disposed of is disposed of: "If, therefore, a person seised[14] of an equitable estate (the legal estate being outstanding) makes an assurance by way of mortgage, or grants an annuity, and afterwards conveys the whole estate to a purchaser, he can grant to the purchaser that which he has, *viz.*, the estate subject to the mortgage or annuity, and no more."[15]

[10] *Ante*, p. 22.
[11] Some "equities," however, may not bind even with notice, *post*, p. 701.
[12] *Phillips* v. *Phillips* (1862) 4 De G.F. & J. 208 at p. 215; Tiley, p. 28; *post*, p. 699.
[13] M. & W., p. 200.
[14] *i.e.*, entitled to.
[15] *Phillips* v. *Phillips*, *supra*, at p. 215 *per* Lord Westbury L.C.

This view presupposes that the mortgage or annuity constitutes an "equitable interest." If the prior right were only, for instance, a right to rescission of a contract of sale, which is an "equity," a different result ensues. Such a right does not constitute a subtraction from the equitable interest then subsisting in the owner in equity, so that the equitable interest can still be disposed of *in toto*, despite the existence of the right of rescission.[16] The prima facie result is that, as between equitable interests, the prior in time prevails, but as between equitable interests and equities, equitable interests prevail.[17] Thus it appears to follow that priorities between prior equities and later equitable interests are generally determined by reference to their status as such; and an equity is a lesser right, at least to the extent that the principle of bona fide purchaser without notice prevails in such cases. So for this purpose, it is necessary to draw a line between "equities" and "equitable interests," a task which has proved no easy one. The problem of priority is further complicated by the fact that there are several rules governing the matter, and that the relationship between these rules is not clear.[18]

3. Illustrations and Explanations

In one sense of the word, there is an "equity" wherever equity intervenes to modify the common law. Thus equitable interventions in the contexts of privity and of consideration can properly be described as raising "equities" in certain circumstances. But these circumstances are not likely to lead to a competition with a superior "equitable interest." The use of the phrase "an equity" in situations such as these is thus more descriptive of the right than analytical of it. It describes its origin rather than ascribes it to a category. The categorisation of an equitable right as "an equity" rather than as an "equitable interest" has significance and is more often to be encountered in the context of mortgages, charges, and the various grounds for rescission and cancellation of transactions and deeds. For it is in this area of fact that a competition for priority can easily arise. Other subjects that have been discussed obviously have rele-

[16] See (1957) 21 Conv.(N.S.) 195 (V. T. H. Delany), especially at p. 197.

[17] The conduct of the parties may also be relevant, however. In *Rice* v. *Rice* (1853) 2 Drew. 73, a contest between a prior vendor's lien and an equitable mortgage was resolved in favour of the latter due to the conduct of the former in indorsing the deeds with a note of receipt of the purchase money. Kindersley V.-C.'s judgment is classic, and shows that time is not the only factor; but the contest in the case seems to be between two equitable interests (*contra* M. & W., p. 126) and not between an equity and an equitable interest. To what extent conduct other than notice is relevant in the latter situation has not been authoritatively determined.

[18] *Ante*, p. 645 *et seq.*

vance, however, for instance estoppel,[19] and it would be wrong to suppose that the types of situation in which issues of priority can arise are in any way confined.

In *Rice* v. *Rice*,[20] a question of priorities arose between a vendor's lien for unpaid purchase money and a subsequent equitable mortgage without notice of the lien. Kindersley V.-C. held that, "as relates to the nature and quality of the two equitable interests abstractedly considered, they seem to me to stand on an equal footing" [21]; so that, prima facie, the prior in time prevailed.

In *Phillips* v. *Phillips*,[22] the question of priorities arose between an annuity of £20 p.a., charged upon land by the fee simple owner in equity, and a later settlement of the owner's equitable interest. The annuity was to take effect only at a future date; the settlement was made before the date when the annuity was to come into operation, and it contained no notice of the annuity. Lord Westbury held that the settlement was "diminished by the estate which had been previously granted to the annuitant." [23] Again, the prior in time prevailed.

In *Cave* v. *Cave*,[24] a sole trustee of trust funds used part of them to buy land in the name of his brother, who obtained loans on the security of the land from legal and equitable mortgagees who had no notice of the fraud. Fry J. held that the right of the beneficiaries under the trust to follow the money representing the trust assets into the land was an equitable interest of equal quality with the rights of the equitable mortgagees, so that, as between these two rights, the first in time, namely, the rights of the beneficiaries, prevailed; but the rights of the beneficiaries did not of course prevail against the legal mortgagee.

Not all the rights of beneficiaries under trusts are necessarily equitable "interests," however. Thus the right [25] of beneficiaries to have a sale by trustees to one of themselves set aside is probably only an "equity."

Certain other rights, such as a right to rescind a transaction for fraud or undue influence, a right to rectify or cancel documents, and a right of consolidation of mortgages,[26] have been established for

[19] *Ante*, p. 664 and p. 686.
[20] (1853) 2 Drew. 73, *ante*, p. 698, note 17.
[21] *Ibid.* at p. 79.
[22] (1862) 4 De G.F. & J. 208.
[23] *Ibid.* at pp. 218–219.
[24] (1880) 15 Ch.D. 639. *Re Morgan* (1881) 18 Ch.D. 93.
[25] This right is discussed at length in *Holder* v. *Holder* [1968] Ch. 353, where, however, no subsequent equitable interest had arisen.
[26] *Garrard* v. *Frankel* (1862) 30 Beav. 445; *Bainbrigge* v. *Browne* (1881) 18 Ch.D. 188; *Harter* v. *Colman* (1882) 19 Ch.D. 630; *Smith* v. *Jones* [1954] 1 W.L.R. 1089. The last case is further mentioned, *post*, p. 701.

some time as mere "equities." The most modern discussion of these problems comes from a decision of the High Court of Australia.

> In *Latec Investments Ltd.* v. *Hotel Terrigal Pty. Ltd.*,[27] a mortgagee exercised a power of sale over mortgaged land by contriving a sale at a favourable price to one of its subsidiary companies. The mortgagor was held to have a right to have the sale set aside as against the mortgagee and the purchaser. But before the mortgagor had acted on this right, the purchaser had charged the land in favour of a third party who had no notice of the fraudulent character of the sale. The mortgagor's delay may in itself have been a sufficient reason for giving priority to the third party,[28] but the court went on to consider, independently of any issue of estoppel, the nature of the rights of the mortgagor and the third party. Both parties had rights only in equity. The third party had a right which was unquestionably an "equitable interest"; but what was the mortgagor's right? After exercise, it would yield to the mortgagor an equitable interest, namely, the equity of redemption in the land. But was the mortgagor's right an equitable interest before its exercise? Kitto and Menzies JJ. answered this question with a clear negative. In their view, the right was a mere equity, like the equity of rectification, and the matter was not affected either by the fact that an equitable interest would result from its exercise, or that the equity (before its exercise) was a devisable interest.[29] For some purposes, the mortgagor's right might have a proprietary flavour, but not for all purposes, and they held that it was not an equitable interest such as to attract the principle that the first in time prevailed. Accordingly, priority between the mortgagor's right and the third party's right lay, independently of estoppel, in the third party, since his right was an equitable interest and the mortgagor's right was, for this purpose, a mere equity.

Academic explanations of the characteristics that help to distinguish equities and equitable interests have from time to time been attempted, but have all run into difficulties. Professor Wade,[30] for

[27] (1965) 113 C.L.R. 265; Tiley, p. 23. For a critical view, see Jackson, *Principles of Property Law*, pp. 75–77.

[28] *Ibid.* at 276 *per* Kitto J. *Cf. Rice* v. *Rice*, *ante*, p. 699. See also *Re King's Settlement* [1931] 2 Ch. 294.

[29] *Stump* v. *Gaby* (1852) 2 De G.M. & G. 623; *cf. Dickinson* v. *Burrell* (1866) L.R. 1 Eq. 337. Taylor J. took the view that these cases established the mortgagor's right as an equitable interest, apparently for all purposes, but agreed with Kitto and Menzies JJ. in the result since the interest was, in the case before him, subject to an "impediment to title" which the court would not remove: see at p. 286. There is more of linguistics than of substance in this difference of opinion.

[30] [1955] C.L.J. 160–161; *cf.* (1955) 71 L.Q.R. p. 482 (R. E. Megarry).

instance, cautiously suggests that "The dividing line between equitable interests and mere equities is perhaps the discretionary character of the latter," but has to admit that "a purchaser's rights under an estate contract are surely more than a 'mere equity,' yet they rest on the court's willingness to award specific performance." Professor Crane puts it somewhat differently[31]: "The common feature of equitable interests appears to be that they are immediately enforceable against the land through the estate owner for the time being whereas until rectification even the court must act on the deed as it stands." But whether a right based on some form of estoppel can be an equitable interest is a point that is not yet finally settled,[32] and it is far from clear that the language of "immediately enforceable" interests is the most apt guide to its solution.

4. The Distinction in Different Contexts

It is not possible to draw clear distinctions in the use of terminology in this area of equity. Rather, it is preferable to bear in mind on all occasions why a classification has to be made. We have seen that the High Court of Australia felt able to accept that an equitable right might constitute an equitable interest for one purpose, *e.g.*, devisability, but not for another, *e.g.*, priority. This approach points to the only way to a breakdown of the general problem into manageable components. There is no reason why equitable rights should have to be classified in the same way for all purposes. Policy considerations are bound to vary in different areas of the law, and it would seem less productive of anomalies to contemplate different solutions of the problem—"equity or equitable interest"—in different areas of the law than to insist, despite the obvious objections, that there must be one classification for all purposes.

By making this concession, it is easier to deal with the difficulties of rectification referred to by Lord Upjohn in *Smith* v. *Jones*[33] and again in *National Provincial Bank Ltd.* v. *Ainsworth*.[34] In the latter case he said, "I myself cannot see how it is possible for a 'mere equity' to bind a purchaser unless such an equity is ancillary to or dependent upon an equitable estate or interest in the land."[35] This remark, in its context, is closely related to the question of which, if any, non-registrable interests are at all capable of binding land in the hands of successors in title with notice of them. This is a question

[31] (1955) 19 Conv.(N.S.) 346.
[32] *Cf.* Lord Upjohn in *National Provincial Bank Ltd.* v. *Ainsworth* [1965] A.C. 1175 at p. 1240; and see *ante*, pp. 680, 688.
[33] [1954] 1 W.L.R. 1089. *Cf. Westminster Bank* v. *Lee* [1956] Ch. 7.
[34] *Ante*, p. 683.
[35] [1965] A.C. 1175 at p. 1238.

of the utmost importance, as it has implications for conveyancing practice, and it may well be right to restrict most severely the range of such interests.[36] Consequently, the lines have to be drawn strictly. A different approach, however, may be right when no question of registrability arises, as for example, in relation to chattels.[37] Here it may not be necessary to draw lines between kinds of competing equitable rights so strictly. For instance, a problem in priorities could arise between a party entitled under a non-registrable charge and a party entitled to rescission. In dealing with this sort of problem, it may be preferable to weigh the conduct of each of the parties in a more detailed manner than would be possible if the inquiry were restricted according to lines predetermined by a technical status attaching to the rights in question.

5. Conclusion

It is suggested, then, that the classification of the various equitable rights discussed in this and in earlier parts of this book is not of itself a matter of crucial or primary importance. It is certainly necessary to know that certain equitable rights constitute equitable interests; for certain definite consequences[38] flow from that status. But the status is rather one of attribution for a purpose than of conceptual analysis. The same results could be obtained jurisprudentially by proceeding straight from the equitable right in question to the consequence, without using the intermediate terminology. Similarly with "mere equities"; consequences may also flow from a decision to treat a right as a "mere equity." But, again, the statement of the consequences would be no more difficult and might be easier without reference to jurisprudential categories. This is indeed an atomistic conception of equitable rights, but the width and variety of the contributions of equity to English law are such that it might indeed be surprising if they could be parcelled up and labelled in neat and precise categories.

[36] (1967) 31 Conv.(N.S.) 332 at p. 341 (F. R. Crane), *ante*, p. 689; *Downie* v. *Lockwood* [1965] V.R. 257.

[37] Difficult problems arise where chattels are affixed to land, see (1963) 27 Conv. (N.S.) 30 *et seq.* (A. G. Guest and J. F. Lever); and *cf. Poster* v. *Slough Estates Ltd.* [1968] 1 W.L.R. 1515 at pp. 1520–1521 *per* Cross J.: *ante*, p. 693.

[38] Concerning matters such as priority and transmissibility.

APPENDIX A

ESTATE DUTY SCALES

1. Deaths prior to April 16, 1969.

Principal Value		Normal Scale				Agricultural Scale			
Exceeding £	*Not exceeding* £	*Rate*	*Margin* £	s.	d.	*Rate*	*Margin* £	s.	d.
5,000	6,000	1%	5,050	10	1	0·55%	5,027	13	0
6,000	7,000	2%	6,061	4	6	1·10%	6,033	7	4
7,000	8,000	3%	7,072	3	3	1·65%	7,039	2	9
8,000	10,000	4%	8,083	6	8	2·20%	8,044	19	10
10,000	12,500	6%	10,212	15	4	3·30%	10,113	15	1
12,500	15,000	8%	12,771	14	10	4·40%	12,643	16	7
15,000	17,500	10%	15,333	6	8	5·50%	15,174	12	1
17,500	20,000	12%	17,897	14	7	6·60%	17,706	2	1
20,000	25,000	15%	20,705	17	8	8·25%	20,359	13	6
25,000	30,000	18%	25,914	12	9	9·90%	25,457	16	6
30,000	35,000	21%	31,139	4	10	11·55%	30,559	12	10
35,000	40,000	24%	36,381	11	7	13·20%	35,665	6	6
40,000	45,000	28%	42,222	4	6	15·40%	41,040	3	10
45,000	50,000	31%	46,956	10	6	17·05%	45,895	2	5
50,000	60,000	35%	53,076	18	6	19·25%	51,362	4	7
60,000	75,000	40%	65,000	0	0	22·00%	62,115	7	9
75,000	100,000	45%	81,818	3	8	24·75%	77,740	17	4
100,000	150,000	50%	110,000	0	0	27·50%	103,793	2	1
150,000	200,000	55%	166,666	13	4	30·25%	155,913	19	7
200,000	300,000	60%	225,000	0	0	33·00%	208,208	19	2
300,000	500,000	65%	342,857	2	11	35·75%	312,840	9	4
500,000	750,000	70%	583,333	6	8	38·50%	522,357	14	6
750,000	1,000,000	75%	900,000	0	0	41·25%	785,106	7	8
1,000,000		80%	1,250,000	0	0	44·00%	1,049,107	2	11

2. Deaths on or after April 16, 1969.

FINANCE ACT 1969: SCHEDULE 17.

PART I

DETERMINATION OF AMOUNT OF ESTATE DUTY ON ESTATE

The amount of the estate duty on an estate—

(*a*) if the aggregate principal value of all property comprised in the estate does not exceed £10,000, shall be nil;

(*b*) in any other case, shall be an amount equal to the aggregate of—

(i) 25 per cent. of any amount by which that aggregate principal value exceeds £10,000 but does not exceed £17,500; and

(ii) 30 per cent. of any amount by which that aggregate principal value exceeds £17,500 but does not exceed £30,000; and

(iii) 45 per cent. of any amount by which that aggregate principal value exceeds £30,000 but does not exceed £40,000; and

(iv) 60 per cent. of any amount by which that aggregate principal value exceeds £40,000 but does not exceed £80,000; and

(v) 65 per cent. of any amount by which that aggregate principal value exceeds £80,000 but does not exceed £150,000; and

(vi) 70 per cent. of any amount by which that aggregate principal value exceeds £150,000 but does not exceed £300,000; and

(vii) 75 per cent. of any amount by which that aggregate principal value exceeds £300,000 but does not exceed £500,000; and

(viii) 80 per cent. of any amount by which that aggregate principal value exceeds £500,000 but does not exceed £750,000; and

(ix) 85 per cent. of any amount by which that aggregate principal value exceeds £750,000,

but not exceeding an amount equal to 80 per cent. of that aggregate principal value.

APPENDIX B

AUTHORISED INVESTMENTS

TRUSTEE INVESTMENTS ACT 1961: SCHEDULE 1.

PART I

NARROWER-RANGE INVESTMENTS NOT REQUIRING ADVICE

1. In Defence Bonds, National Savings Certificates and Ulster Savings Certificates, Ulster Development Bonds [1] and National Development Bonds.[2]

2. In deposits in the Post Office Savings Bank, ordinary deposits in a trustee savings bank and deposits in a bank or department thereof certified under subsection (3) of section nine of the Finance Act 1956.

PART II

NARROWER-RANGE INVESTMENTS REQUIRING ADVICE

1. In securities issued by Her Majesty's Government in the United Kingdom, the Government of Northern Ireland or the Government of the Isle of Man, not being securities falling within Part I of this Schedule and being fixed-interest securities registered in the United Kingdom or the Isle of Man, Treasury Bills or Tax Reserve Certificates.

2. In any securities the payment of interest on which is guaranteed by Her Majesty's Government in the United Kingdom or the Government of Northern Ireland.

3. In fixed-interest securities issued in the United Kingdom by any public authority or nationalised industry or undertaking in the United Kingdom.

4. In fixed-interest securities issued in the United Kingdom by the government of any overseas territory within the Commonwealth or by any public or local authority within such a territory, being securities registered in the United Kingdom.

References in this paragraph to an overseas territory or to the government of such a territory shall be construed as if they occurred in the Overseas Service Act 1958.

5. In fixed-interest securities issued in the United Kingdom by the International Bank for Reconstruction and Development, or by the Inter-American Development Bank [3] being securities registered in the United Kingdom.

6. In debentures issued in the United Kingdom by a company incorporated in the United Kingdom, being debentures registered in the United Kingdom.

[1] Trustee Investments (Additional Powers) (No. 2) Order 1962 (S.I. No. 2611).
[2] Trustee Investments (Additional Powers) Order 1964 (S.I. No. 703).
[3] Trustee Investments (Additional Powers) (No. 2) Order 1964 (S.I. No. 1404).

7. In stock of the Bank of Ireland and in Bank of Ireland 7 per cent. Loan Stock 1986/91.[4]

8. In debentures issued by the Agricultural Mortgage Corporation Limited or the Scottish Agricultural Securities Corporation Limited.

9. In loans to any authority to which this paragraph applies charged on all or any of the revenues of the authority or on a fund into which all or any of those revenues are payable, in any fixed-interest securities issued in the United Kingdom by any such authority for the purpose of borrowing money so charged, and in deposits with any such authority by way of temporary loan made on the giving of a receipt for the loan by the treasurer or other similar officer of the authority and on the giving of an undertaking by the authority that, if requested to charge the loan as aforesaid, it will either comply with the request or repay the loan.

This paragraph applies to the following authorities, that is to say—

(*a*) any local authority in the United Kingdom;

(*b*) any authority all the members of which are appointed or elected by one or more local authorities in the United Kingdom;

(*c*) any authority the majority of the members of which are appointed or elected by one or more local authorities in the United Kingdom, being an authority which by virtue of any enactment has power to issue a precept to a local authority in in England and Wales, or a requisition to a local authority in Scotland, or to the expenses of which, by virtue of any enactment, a local authority in the United Kingdom is or can be required to contribute;

(*d*) the Receiver for the Metropolitan Police District or a combined police authority (within the meaning of the Police Act 1946);

(*e*) the Belfast City and District Water Commissioners;

(*f*) the Great Ouse Water Authority [5] and other river authorities not otherwise included in this paragraph.[6]

10. In debentures or in the guaranteed or preference stock of any incorporated company, being statutory water undertakers within the meaning of the Water Act 1945 or any corresponding enactment in force in Northern Ireland, and having during each of the ten years immediately preceding the calendar year in which the investment was made paid a dividend of not less than five per cent. on its ordinary shares.

11. In deposits by way of special investment in a trustee savings bank or in a department (not being a department certified under subsection (3) of section nine of the Finance Act 1956) of a bank any other department of which is so certified.

12. In deposits in a building society designated under section one of the House Purchase and Housing Act 1959.[7]

13. In mortgages of freehold property in England and Wales or Northern Ireland and of leasehold property in those countries of which

[4] Trustee Investments (Additional Powers) Order 1966 (S.I. No. 401).
[5] Trustee Investments (Additional Powers) Order 1962 (S.I. No. 658).
[6] Water Resources Act 1963, Sched. 4, para. 33.
[7] See Building Societies (Designation for Trustee Investment) Regulations 1964 (S.I. No. 1354).

the unexpired term at the time of investment is not less than sixty years, and in loans on heritable security in Scotland.

14. In perpetual rent-charges charged on land in England and Wales or Northern Ireland and fee-farm rents (not being rent-charges) issuing out of such land, and in feu-duties or ground annuals in Scotland.

PART III

WIDER-RANGE INVESTMENTS

1. In any securities issued in the United Kingdom by a company incorporated in the United Kingdom, being securities registered in the United Kingdom and not being securities falling within Part II of this Schedule.

2. In shares in any building society designated under section one of the House Purchase and Housing Act 1959.

3. In any units, or other shares of the investments subject to the trusts, of a unit trust scheme in the case of which there is in force at the time of investment an order of the Board of Trade under section seventeen of the Prevention of Fraud (Investments) Act 1958 or of the Ministry of Commerce for Northern Ireland under section sixteen of the Prevention of Fraud (Investments) Act (Northern Ireland) 1940.

PART IV

SUPPLEMENTAL

1. The securities mentioned in Parts I to III of this Schedule do not include any securities where the holder can be required to accept repayment of the principal, or the payment of any interest, otherwise than in sterling.

2. The securities mentioned in paragraphs 1 to 8 of Part II, other than Treasury Bills or Tax Reserve Certificates, securities issued before the passing of this Act by the Government of the Isle of Man, securities falling within paragraph 4 of the said Part II issued before the passing of this Act or securities falling within paragraph 9 of that Part, and the securities mentioned in paragraph 1 of Part III of this Schedule, do not include—

(*a*) securities the price of which is not quoted on a recognised stock exchange within the meaning of the Prevention of Fraud (Investments) Act 1958, or the Belfast stock exchange;

(*b*) shares or debenture stock not fully paid up (except shares or debenture stock which by the terms of issue are required to be fully paid up within nine months of the date of issue).

3. The securities mentioned in paragraph 6 of Part II and paragraph 1 of Part III of this Schedule do not include—

(*a*) shares or debentures of an incorporated company of which the total issued and paid up share capital is less than one million pounds;

(*b*) shares or debentures of an incorporated company which has not in each of the five years immediately preceding the calendar

year in which the investment is made paid a dividend on all the shares issued by the company, excluding any shares issued after the dividend was declared and any shares which by their terms of issue did not rank for the dividend of that year.

For the purposes of sub-paragraph (*b*) of this paragraph a company formed—

(i) to take over the business of another company or other companies, or

(ii) to acquire the securities of, or control of, another company or other companies,

or for either of those purposes and for other purposes shall be deemed to have paid a dividend as mentioned in that sub-paragraph in any year in which such a dividend has been paid by the other company or all the other companies, as the case may be.

4. In this Schedule, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

"debenture" includes debenture stock and bonds, whether constituting a charge on assets or not, and loan stock or notes;

"enactment" includes an enactment of the Parliament of Northern Ireland;

"fixed-interest securities" means securities which under their terms of issue bear a fixed rate of interest;

"local authority" in relation to the United Kingdom, means any of the following authorities

(*a*) in England and Wales, the council of a county, a borough (including a borough which has been included in a rural district), an urban or rural district or a parish, the Common Council of the City of London, The Greater London Council [8] and the Council of the Isles of Scilly;

(*b*) in Scotland, a local authority within the meaning of the Local Government (Scotland) Act 1947;

(*c*) in Northern Ireland, the council of a county, a county or other borough, or an urban or rural district;

"ordinary deposits" and "special investment" have the same meaning respectively as in the Trustee Savings Banks Act 1954;

"securities" includes shares, debentures, Treasury Bills and Tax Reserve Certificates;

"share" includes stock;

"Treasury Bills" includes Exchequer bills and other bills issued by Her Majesty's Government in the United Kingdom and Northern Ireland Treasury Bills.

5. It is hereby declared that in this Schedule "mortgage", in relation to freehold or leasehold property in Northern Ireland, includes a registered charge which, by virtue of subsection (4) of section forty of the Local Registration of Title (Ireland) Act 1891 or any other enactment, operates as a mortgage by deed.

[8] London Government Act 1963, Sched. 17, para. 25.

6. References in this Schedule to an incorporated company are references to a company incorporated by or under any enactment and include references to a body of persons established for the purpose of trading for profit and incorporated by Royal Charter.

7. The references in paragraph 12 of Part II and paragraph 2 of Part III of this Schedule to a building society designated under section one of the House Purchase and Housing Act 1959 include references to a permanent society incorporated under the Building Societies Acts (Northern Ireland) 1874 to 1940 for the time being designated by the Registrar for Northern Ireland under subsection (2) of that section (which enables such a society to be so designated for the purpose of trustees' powers of investment specified in paragraph (*a*) of subsection (1) of that section).

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